DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-210
Title: United States, Petitioner
v.
Xavier Alvarez
Docketed: August 18, 2011
Linked with 10A1199
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-50345)
Decision Date: August 17, 2010
Rehearing Denied: March 21, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 8 2011	Application (10A1199) to extend the time to file a petition for a writ of certiorari from June 19, 2011 to July 19, 2011, submitted to Justice Kennedy.
Jun 17 2011	Application (10A1199) granted by Justice Kennedy extending the time to file until July 19, 2011.
Jul 8 2011	Application (10A1199) to extend further the time to file a petition for a writ of certiorari from July 19, 2011 to August 18, 2011, submitted to Justice Kennedy.
Jul 14 2011	Application (10A1199) granted by Justice Kennedy extending the time to file until August 18, 2011.
Aug 18 2011	Petition for a writ of certiorari filed. (Response due September 19, 2011)
Sep 16 2011	Brief of respondent Xavier Alvarez in opposition filed.
Sep 16 2011	Motion for leave to proceed in forma pauperis filed by respondent Xavier Alvarez.
Sep 28 2011	DISTRIBUTED for Conference of October 14, 2011.
Sep 29 2011	Reply of petitioner United States filed. (Distributed)
Oct 17 2011	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 17 2011	Petition GRANTED.
Dec 1 2011	Joint appendix filed.
Dec 1 2011	Brief of petitioner United States filed.
Dec 7 2011	Brief amici curiae of Professors Eugene Volokh and James Weinstein filed.
Dec 8 2011	Brief amici curiae of Texas, et al. filed.
Dec 8 2011	Brief amici curiae of Veterans of Foreign Wars of the United States, et al. filed.
Dec 8 2011	Brief amicus curiae of Congressional Medal of Honor Foundation filed.
Dec 8 2011	Brief amicus curiae of Intellectual Property Clinic of the University of New Hampshire filed.

Dec 8 2011	Brief amicus curiae of The American Legion filed.
Dec 8 2011	Brief amici curiae of Legion of Valor of the United States, et al. filed.
Dec 15 2011	The time to file respondent's brief on the merits is extended to and including January 13, 2012.
Dec 19 2011	SET FOR ARGUMENT ON Wednesday, February 22, 2012.
Dec 23 2011	Record received from U.S.C.A. for the 9th Circuit. (1envelope)
Dec 23 2011	The record from U.S.D.C. for District Court for the Central District of California is electronic.
Jan 3 2012	CIRCULATED.
Jan 13 2012	Brief of respondent Xavier Alvarez filed. (Distributed)
Jan 18 2012	Sealed record from U.S.D.C. for Central District of California.
Jan 19 2012	Brief amicus curiae of Professor Jonathan D. Varat filed. (Distributed)
Jan 19 2012	Brief amici curiae of American Booksellers Foundation for Free Expression, et al. filed. (Distributed)
Jan 20 2012	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed. (Distributed)
Jan 20 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jan 20 2012	Brief amicus curiae of Thomas Jefferson Center for the Protection of Free Expression filed. (Distributed)
Jan 20 2012	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Jan 20 2012	Brief amicus curiae of First Amendment Coalition filed. (Distributed)
Jan 27 2012	Brief amicus curiae of First Amendment Lawyers Association filed. (Distributed)
Feb 13 2012	Reply of petitioner United States filed. (Distributed)
Feb 22 2012	Argued. For petitioner: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For respondent: Jonathan D. Libby, Deputy Federal Public Defender, Los Angeles, Cal.

PETITION FOR WRIT OF CERTIORARI

No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 704(b) of Title 18, United States Code, makes it a crime when anyone "falsely represents himself or herself, * * * verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

The question presented is whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-90a) is reported at 617 F.3d 1198. The order of the court of appeals denying rehearing en banc (App., *infra*, 91a-138a) is reported at 638 F.3d 666. The opinion of the district court (App., *infra*, 139a-144a) denying respondent's motion to dismiss is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2010. A petition for rehearing was denied on March 21, 2011. On June 17, 2011, Justice Kennedy ex-

tended the time within which to file a petition for a writ of certiorari to and including July 19, 2011. On July 14, 2011, Justice Kennedy further extended the time to and including August 18, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." Section 704 of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 145a-147a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Central District of California, respondent was convicted of making a false representation of having earned a military award, in violation of 18 U.S.C. 704(b). The district court sentenced respondent to three years of probation. The court of appeals reversed the judgment of conviction on the ground that Section 704(b) is facially unconstitutional and remanded for further proceedings consistent with its opinion. App., *infra*, 39a-40a.

1. a. In 18 U.S.C. 704(b), known as the Stolen Valor Act of 2005, Congress made it a misdemeanor criminal offense, punishable by up to six months in prison, to "falsely represent[] * * * verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." Congress provided an enhanced penalty of up to one year of imprisonment for offenses involving certain enumerated awards, including the Medal of Honor. 18 U.S.C. 704(c)-(d).

b. The government's tradition of awarding military honors in order to recognize acts of valor in service to the Nation dates back to the Revolutionary War. In 1782, General George Washington ordered the creation of several decorations recognizing military service and a valor award honoring "singularly meritorious action[s]" of "unusual gallantry," "extraordinary fidelity," or "essential service." *General Orders of George Washington Issued at Newburgh on the Hudson*, 1782-1783, at 35 (Edward C. Boynton ed., 1883) (reprint 1909) (*General Orders*); Armed Forces Information Service, Dep't of Defense, *Armed Forces Decorations and Awards* 4 (1992). The purpose of Washington's valor award was to "to cherish a virtuous ambition in * * * soldiers, as well as to foster and encourage every species of military merit." *General Orders* 35. General Washington specified that the award should be conferred only after rigorous examination to ensure that recipients were deserving: "the particular fact or facts on which the [award] is to be grounded must be set forth to the Commander-in-Chief, accompanied with certificates from the commanding officers * * * [or] other incontestible proof." *Ibid.* Recipients would be entitled to certain special military privileges, see *ibid.*, and they were also expected to receive more intangible rewards: "it is expected that these gallant men who are thus distinguished will, on all occasions, be treated with particular confidence and consideration," *id.* at 34-35. Moreover, General Washington stated, "[s]hould any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished." *Id.* at 34.

Today, the United States government maintains a system of military decorations and honors that shares

its essential characteristics with the first awards authorized by General Washington. The highest military honors are established by statute or Executive Order, and they have rigorous eligibility criteria. For instance, the Medal of Honor, which occupies the highest position in the hierarchy and was first established during the Civil War in 1861, see Act of Dec. 21, 1861, 12 Stat. 329-330, is awarded by the President, in the name of Congress, to a person who "distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty" while engaged in certain armed conflicts. 10 U.S.C. 3741; see also, *e.g.*, 10 U.S.C. 3742 (Distinguished Service Cross, awarded for "extraordinary heroism not justifying the award of a medal of honor"); 10 U.S.C. 3746 (Silver Star); Exec. Order No. 11,046, 3 C.F.R. 630 (1959-1963 Comp.) (Bronze Star). See generally The Institute of Heraldry, Office of the Administrative Assistant to the Sec'y of the Army, *Military Decorations*, http://www.tioh.hqda.pentagon.mil/awards/decorations.aspx (Aug. 9, 2011).

The Department of Defense and the armed services branches have guidelines for the award of honors. See Dep't of Defense, *Manual of Military Decorations and Awards*, No. 1348.33 (2010) (*Awards Manual*); see also, *e.g.*, Marine Corps Order 1650.19J (Feb. 5, 2001); SECNAV Instruction 1650.1H (Aug. 22, 2006); Army Reg. 600-8-22 (Dec. 11, 2006); Air Force Policy Directive (AFPD) 36-28 (Aug. 1, 1997). These guidelines specify the extensive criteria for an award; the number and necessary content of eyewitness statements; the standard of proof; and the necessary approvals that the recommendation must garner within the chain of command. See, *e.g.*, *Awards Manual* 31; SECNAV Instruction

1650.1H, §§ 2-5 to 2-8, 2-15; Marine Corps Order 1650.19J at para. 2.

The armed services have long held the view that the awards program performs crucial functions within the military. The conferral of awards is considered "an important aspect of command responsibility at all levels" because the "[p]rompt and judicious recognition of an individual's achievement or service is a vital factor of morale." Marine Corps Order 1650.19J at para. 2; see Army Reg. 600-8-22, ch. 1, § 1-1 ("The goal of the total Army awards program is to foster mission accomplishment by recognizing excellence of both military and civilian members of the force and motivating them to high levels of performance and service."); SECNAV Instruction 1650.1H, § 3-1; AFPD 36-28, para. 2. "[R]ecognizing acts of valor, heroism, and exceptional duty and achievement" fosters pride in service and motivates individuals to higher achievement. *Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 109th Cong., 2d Sess. 24 (2006) (*Awards Hearing*) (statement of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force). And military honors also confer prestige on recipients and express the Nation's gratitude for heroic acts and military service. See S. Rep. No. 240, 64th Cong., 1st Sess. 3 (1916).

In view of the importance of the military honors program, Congress and the service branches have taken a number of steps to guard against dilution of the reputation and meaning of the medals. The highest military honors may not be awarded to someone whose subsequent conduct "has not been honorable," see, *e.g.*, 10 U.S.C. 3744(c) and 6249, and medals may be revoked if

later-discovered facts would have prevented the award of the medal, see *Awards Manual* 4. Since the early twentieth century, Congress has also made efforts to prevent dilution, including false representations of having received a medal, by providing for the publication of the names of Medal of Honor recipients; patenting the medal's design in 1904 in order to prevent imitations; and establishing, in 1916, a committee to review previous Medal of Honor awards and rescind those that did not meet the standards codified in 10 U.S.C. 3741. See 38 U.S.C. 1560; *S. Comm. on Veterans' Affairs*, 93d Cong., 1st Sess., *Medal of Honor Recipients 1861-1973*, at 4-7 (Comm. Print 1973) (*Medal of Honor Report*) (explaining that false claims and other abuses necessitated various actions to "protect the dignity of the original medal"). In 1923, Congress prohibited knowingly wearing, manufacturing, or selling a military medal without authorization. See Act of Feb. 24, 1923, Pub. L. No. 67-438, 42 Stat. 1286. That provision, now codified at 18 U.S.C. 704(a), was enacted on the recommendation of the War Department, which had expressed concern that unauthorized imitations would "cheapen[] the decorations in question" and noted that "[i]f the decorations of honor * * * awarded by the War Department are to continue to serve the high purpose for which they are intended, they are worthy of being protected." H. Rep. No. 1484, 67th Cong., 4th Sess. 1-2 (1923).

In 2006, Congress enacted the Stolen Valor Act in response to concern that the longstanding prohibition on the unauthorized wearing and sale of medals, see 18 U.S.C. 704(a), had proved insufficient to deter false claims to have been awarded a medal. See 151 Cong. Rec. S12,688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad). Section 704(b), the provision at issue in this

case, makes it an offense when anyone "falsely represents himself or herself, * * * verbally or in writing, to have been awarded" a military decoration or medal. Congress expressly declared that the purpose of the prohibition is "to protect the reputation and meaning of military decorations and medals." Stolen Valor Act of 2005 (Stolen Valor Act), Pub. L. No. 109-437, § 2, 120 Stat. 3266. In passing the Act, Congress found that "[f]raudulent claims surrounding the receipt of [military decorations and medals] damage the reputation and meaning of such decorations and medals" and that "[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning" of the medals.[1] *Ibid.*

2. a. Respondent was an elected member of the Board of Directors of the Three Valley Water District in southern California. App., *infra*, 4a. On July 23, 2007, respondent stated at a public water district board meeting that he was a retired United States Marine, that he had been "wounded many times," and that he had been "awarded the Congressional Medal of Honor" in 1987. *Ibid.* Respondent has never served in the United States Armed Forces. *Ibid.*

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[1] In May 2011, Representative Joseph Heck introduced a bill to amend the Stolen Valor Act in the House of Representatives, and it is currently pending before the Judiciary Committee and its Subcommittee on Crime, Terrorism, and Homeland Security. See H.R. 1775, 112th Cong.; 157 Cong. Rec. H3108 (daily ed. May 5, 2011). The bill would replace Section 704(b) with a new provision that makes it an offense when someone, "with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service," including misrepresentations about having received a medal or decoration, having attained a particular rank, or having served in the armed forces or a combat zone. H.R. 1775 § 2.

After the Federal Bureau of Investigation obtained a recording of the July 23 meeting, the government charged respondent with two counts of "falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [respondent] knew, he had not received the Congressional Medal of Honor," in violation of 18 U.S.C. 704(b) and (c)(1). App., *infra*, 5a.

b. Respondent moved to dismiss the charges on the ground that the Stolen Valor Act is invalid under the First Amendment, both facially and as applied to him. App., *infra*, 141a.

The district court denied the motion. App., *infra*, 139a-144a. The court saw "no dispute that [respondent] made his false statement knowingly and intentionally," *id.* at 142a, and explained that in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court had held that knowingly false statements are "not protected under the First Amendment." Respondent's knowingly false statement, the court concluded, was not protected speech, and his as-applied challenge therefore failed. App., *infra*, 142a-143a. The court also rejected respondent's facial challenge, reasoning that the Act was "narrowly written" to prohibit only "deliberate false statements concerning a very specific subject matter." *Id.* at 144a n.1. The court emphasized that the Act "does not risk chilling" truthful statements about military service because "[w]hether one actually received a military award is easily verifiable and not subject to multiple interpretations." *Ibid.*

c. Respondent pleaded guilty, reserving his right to appeal the denial of his motion to dismiss the indictment. The district court sentenced respondent to three years of probation and imposed a fine of $5000. Judgment 1.

3. a. The court of appeals reversed and remanded. App., *infra*, 1a-40a. The court first held, relying on *United States* v. *Stevens*, 130 S. Ct. 1577 (2010), that "false factual speech, as a general category unto itself," does not fall within those "historical and traditional categories [of unprotected speech] long familiar to the bar." App., *infra*, 15a (quoting 130 S. Ct. at 1584); see *id.* at 10a-15a. The court reasoned that *Stevens*, in discussing the historically recognized categories of unprotected speech, mentioned two subsets of false speech—defamation and fraud—without suggesting that false statements, as a general category, are unprotected. *Id.* at 7a. The court of appeals acknowledged that this Court has repeatedly stated that false speech is "not worthy of constitutional protection," *id.* at 16a (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and *Garrison*, 379 U.S. at 75), but it observed that the Court has never held "that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false," *id.* at 30a-31a. Indeed, the court of appeals found "affirmative constitutional value" in some knowingly false speech, such as "[s]atirical entertainment" and hyperbole. *Id.* at 31a.

The court of appeals next concluded that Section 704(b) cannot be characterized as a regulation of the unprotected categories of defamation or fraud. The court reasoned that Section 704(b) does not "fit[] into the defamation category" because it does not prohibit only speech that is made with actual malice or knowledge of falsity and that is "injurious to a private individual." App., *infra*, 22a-23a (quoting *Gertz*, 418 U.S. at 347). The court explained that even if Congress had concluded that false representations to have been awarded a medal cause "presumptive harm" to the

meaning and effectiveness of military honors, the First Amendment does not permit the government to protect the reputation of "governmental institutions or symbols," such as military awards, "by means of a pure speech regulation." *Id.* at 24a, 25a. And the court held that the Act prohibits speech that does not constitute fraud because it reaches false statements without regard to scienter, materiality, or reliance, elements that might ensure that the regulated speech causes "bona fide harm." *Id.* at 26a-30a.

Having concluded that the speech prohibited by Section 704(b) "does not fit neatly into any of those well-defined and narrowly limited classes of speech previously considered unprotected," App., *infra*, 32a (internal quotation marks omitted), the court applied strict scrutiny, *id.* at 35a. The court acknowledged that "Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women." *Id.* at 37a. But the court concluded that Section 704(b) is not narrowly tailored because "other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud." *Id.* at 39a.

b. Judge Bybee dissented. App., *infra*, 41a-90a. He explained that this Court's decisions establish that "the general rule is that false statements of fact are not protected by the First Amendment," *id.* at 46a, except in limited circumstances in which certain false statements made without scienter receive protection in order to ensure adequate "breathing space" to constitutionally protected speech, *id.* at 50a, 53a-55a. Applying that framework to Section 704(b), Judge Bybee concluded that respondent's as-applied challenge must fail because re-

spondent did not dispute that his statements were knowingly false. *Id.* at 68a-69a.

Judge Bybee also would have held that Section 704(b) is not facially overbroad. He reasoned that the Act's prohibition of self-aggrandizing lies does not deter protected expression, even if the Act is interpreted not to contain a scienter requirement, because mistaken claims to have won a medal "will be extraordinarily rare if not nonexistent." App., *infra*, 84a. Judge Bybee also argued that Section 704(b)'s prohibition on falsely "represent[ing]" to have been awarded a medal indicates that the Act extends only to statements that can be interpreted as statements of fact, not ambiguous statements, hyperbole, or satire. *Id.* at 82a-83a, 87a-90a. He therefore concluded that Section 704(b) was free from "any potential overbreadth" and that in any event, any overbreadth was not substantial. *Id.* at 90a.

4. The government petitioned for rehearing en banc. The court of appeals denied rehearing in a published order. App., *infra*, 91a-138a. Judge Milan Smith, joined by Chief Judge Kozinski, authored an opinion concurring in the denial of rehearing en banc, in which Judge Smith reiterated the reasoning of the panel majority's opinion. *Id.* at 92a-106a.

Chief Judge Kozinski also authored a separate concurrence, in which he noted that lies about oneself are commonplace in day-to-day social interactions. App., *infra*, 107a-115a. In his view, a First Amendment doctrine that did not protect false statements of fact would be "terrifying," because it would permit censorship by "the truth police" of "the white lies, exaggerations and deceptions that are an integral part of human intercourse." *Id.* at 107a-108a.

Judge O'Scannlain, joined by six other judges, dissented from denial of rehearing. App., *infra*, 116a-135a. Judge O'Scannlain argued that the panel opinion "runs *counter* to nearly 40 years of Supreme Court precedent," including the Court's decisions on defamation and baseless lawsuits. *Id.* at 116a (emphasis omitted); see *id.* at 118a-125a. That precedent, he explained, established that false statements of fact receive only the derivative protection necessary to ensure that "constitutionally protected non-false speech" is not inhibited. *Id.* at 119a. Judge O'Scannlain therefore argued that "restrictions upon false speech do not receive strict scrutiny," but rather, they are evaluated to determine whether they provide sufficient breathing space for protected speech. *Id.* at 119a-120a. Judge O'Scannlain reasoned further that the panel majority had erred in concluding that the First Amendment required the criminal prosecution of false statements to be based on a showing of individualized harm, *id.* at 129a-131a, but in any event, all false claims of military awards contribute to the reputational and other harms that Congress identified in passing Section 704(b), *id.* at 132a-133a.

Judge Gould, who joined Judge O'Scannlain's dissent, also authored a separate dissent. App., *infra*, 135a-138a. He argued that it was "improper to apply strict scrutiny to invalidate this law on its face" in view of Congress's broad power over military affairs and the "lack of any societal utility in tolerating false statements of military valor." *Id.* at 136a. Judge Gould would have held that "Congress's criminalization of making false statements about receiving military honors is a carefully defined subset of false factual statements not meriting constitutional protection." *Id.* at 137a (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

The court of appeals held facially unconstitutional an Act of Congress that plays a vital role in safeguarding the integrity and efficacy of the government's military honors system. Section 704(b) prohibits a narrow category of knowingly false factual representations that Congress has determined undermine the capacity of military awards to confer honor on their recipients and to foster morale and esprit de corps within the armed forces. The court of appeals erroneously subjected Section 704(b) to strict scrutiny, notwithstanding this Court's longstanding treatment of false factual statements as entitled, at most, only to limited First Amendment protection. In so doing, the court of appeals disregarded this Court's decisions upholding content-based false-speech restrictions that, like Section 704(b), are supported by an important government interest and provide adequate breathing space for fully protected speech. Even if the court of appeals was correct to apply strict scrutiny, Section 704(b) is valid under that standard because it is narrowly tailored to serve a compelling interest. Although the decision below is the first court of appeals decision to address Section 704(b)'s constitutionality, the question is currently pending in four other circuit courts. Review of the court of appeals' constitutional holding is therefore warranted.

I. THE COURT OF APPEALS' INVALIDATION OF AN IMPORTANT ACT OF CONGRESS WARRANTS THIS COURT'S REVIEW

This Court should grant review because the court of appeals has invalidated an important Act of Congress on its face. See App., *infra*, 39a ("As presently drafted, the Act is facially invalid under the First Amendment.").

This Court has often reviewed lower-court decisions holding that a federal law is unconstitutional, even in the absence of a circuit split. See, *e.g.*, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States* v. *Stevens*, 130 S. Ct. 1577 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000); *NEA* v. *Finley*, 524 U.S. 569 (1998); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). That practice is consistent with the Court's recognition that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

Although the decision in this case is the first from a court of appeals to address the constitutionality of Section 704(b), the issue is a substantial and recurring one. The Eighth, Tenth, and Eleventh Circuits are currently considering challenges to the Act's constitutionality, and an appeal of a district court decision upholding the Act has recently been filed in the Fourth Circuit. See *United States* v. *Strandlof*, No. 10-1358 (10th Cir. argued May 12, 2011) (government's appeal of district court's dismissal of information charging defendant with five counts of violating Section 704(b), on the ground that the statute is facially unconstitutional); *United States* v. *Amster*, No. 10-12139 (11th Cir. filed May 11, 2010) (defendant's appeal of district court's denial of motion for judgment of acquittal on the ground that the Act was facially unconstitutional); *United States* v. *Kepler*, No. 11-2278 (8th Cir. filed June 10, 2011) (government's appeal of district court's dismissal of one count of

indictment on the ground that Section 704(b) and (d) are unconstitutionally overbroad); *United States* v. *Robbins*, No. 11-4757 (4th Cir. filed July 29, 2011) (appeal of decision upholding Section 704(b) against First Amendment challenge, see 759 F. Supp. 2d 815 (W.D. Va. 2011)).

This Court's review is particularly appropriate because Section 704(b) serves a vital function: protecting the integrity and effectiveness of the military honors system. That system has long been an integral element of the armed services' personnel and readiness efforts. Medals acknowledge acts of military heroism and sacrifice, and express the Nation's gratitude for the patriotism and courage of those who have acted heroically in the face of danger; they inform the public about acts of valor during armed conflicts; and within the armed services, they foster morale and core military values. False claims to have won a medal dilute the meaning of military awards, thereby undermining their ability to serve their intended purposes. See pp. 23-26, *infra*. The government has therefore regularly brought prosecutions under Section 704(b) to put a stop to long-running deceptions and to deter other false claims. See, *e.g.*, Gov't C.A. Br. 3-4, *United States* v. *Strandlof* (10th Cir.) (No. 10-1358) (defendant falsely claimed, over the course of several years, that he had been awarded the Purple Heart and Silver Star medals in connection with fundraising for the veterans organization that he founded, despite never having served in the military); Gov't C.A. Br. 2-12, *United States* v. *Amster* (11th Cir.) (No. 10-12139) (defendant provided falsified military-service records showing that he had won a Medal of Honor to state and local officials and sought federal assistance to obtain a Medal of Honor that he falsely claimed had been awarded to him and lost in shipment). Because the

court of appeals' decision invalidates an important Act of Congress designed to protect the integrity of the Nation's military honors system, this Court's review is warranted.

II. THE COURT OF APPEALS' DECISION IS INCORRECT

A. Section 704(b) Prohibits Only Knowingly False Statements That Reasonably Can Be Understood As Assertions Of Fact

The "first step" in First Amendment analysis is "to construe the challenged statute." *Williams*, 553 U.S. at 293. The court of appeals erroneously interpreted Section 704(b) to prohibit unknowing and satirical claims to have won a military medal. See App., *infra*, 24a-25a, 34a-35a; *id.* at 87a-90a (Bybee, J., dissenting). Properly construed, Section 704(b) prohibits a discrete and narrow category of factual statements: knowingly false representations that a reasonable observer would understand as a factual claim that the speaker has been awarded a military medal.

Although Section 704(b) does not use the term "knowing" or "knowingly," its prohibition on "falsely represent[ing]" that one has received a military medal indicates that the provision requires knowledge of falsity. To "represent" something is to "[t]o place (a fact) clearly before another; to state or point out explicitly or seriously to one, with a view to influencing action or conduct." See 13 *Oxford English Dictionary* 657 (2d ed. 1989); see also *Black's Law Dictionary* 1415 (9th ed. 2009) (a "representation" is made "to induce someone to act"). A "false representation," also known as a "misrepresentation," is "[t]he act of making a false or misleading statement about something, usu[ally] with the intent to deceive." *Id.* at 1091. Thus, the phrase "falsely

represent" connotes making a factual assertion with the knowledge that it is false. See Stolen Valor Act § 2(1), 120 Stat. 3266 (congressional findings referring to "[f]raudulent claims surrounding the receipt" of medals). That interpretation is buttressed by the presumption that, absent contrary evidence of congressional intent not present here, criminal statutes contain a mens rea requirement even when the statute is silent on that issue. See, *e.g.*, *Staples* v. *United States*, 511 U.S. 600, 605-606 (1994); *Morissette* v. *United States*, 342 U.S. 246, 250 (1952).

Similarly, the statutory term "represent" excludes parody, satire, hyperbole, performances, and any other statements that cannot reasonably be understood as factual claims. See *Oxford English Dictionary* 657; *Black's Law Dictionary* 1415 ("representation" is a "presentation of fact"); *id.* at 1091 (a misrepresentation is a "false assertion of fact" (quoting Restatement (Second) Contracts § 159 cmt. a (1979)). In enacting Section 704(b), Congress found that "[f]raudulent claims surrounding the receipt" of military medals threaten the reputation of the medals. See Stolen Valor Act § 2(1), 120 Stat. 3266. Nothing suggests that Congress sought to prohibit statements about having received a medal that would be understood as fictional or hyperbolic rather than as "claims" to have actually received a medal. See *Watts* v. *United States*, 394 U.S. 705, 705, 708 (1969) (per curiam) (interpreting prohibition on knowingly making "any threat" to harm the President as excluding "political hyperbole" in the absence of any evidence of contrary congressional intent); App., *infra*, 87a-90a (Bybee, J., dissenting).

B. This Court's Decisions On False Factual Statements Demonstrate That Section 704(b) Is Constitutional

The court of appeals erroneously held that because false factual statements do not constitute a historically recognized category of completely unprotected speech, Section 704(b) should be subjected to strict scrutiny. This Court has made clear that false statements of fact are entitled, at most, only to limited First Amendment protection that is derivative of the need to ensure that any false-speech restriction does not chill truthful and other fully protected speech. The Court has therefore upheld content-based regulations of false statements of fact that are supported by an important government interest and provide adequate "breathing space" for fully protected speech. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). Considered under that framework, Section 704(b) is constitutional.

1. a. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court explained that "[c]alculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas." *Id.* at 75 (citation and internal quotation marks omitted). Since then, the Court has frequently reiterated the principle that false factual statements have no First Amendment value in themselves. See, *e.g.*, *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 531 (2002) (stating that "false statements [are] unprotected for their own sake"); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988) (*Hustler*) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas."); *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no

First Amendment credentials."); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact," because such statements do not "materially advance[] society's interest in uninhibited, robust, and wide-open debate on public issues") (quoting *New York Times Co.*, 376 U.S. at 270).

Accordingly, this Court's First Amendment decisions have long recognized that false factual statements "are not protected by the First Amendment in the same manner as truthful statements." *Brown* v. *Hartlage*, 456 U.S. 45, 60-61 (1982) (citation omitted); see also, *e.g.*, *BE&K Constr. Co.*, 536 U.S. at 531; *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1966) ("[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function."). Although the broad general category of false factual statements is not one that historically has been treated as completely unprotected by the First Amendment, see *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (requiring a "long * * * tradition of proscription" for a category of speech to be wholly unprotected); *Stevens*, 130 S. Ct. at 1584, the Court has repeatedly stated, in numerous contexts, that false factual statements do not receive First Amendment protection for their own sake. See, *e.g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (*Virginia State Bd.*) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); see also *BE&K Constr. Co.*, 536 U.S. at 531 (stating that false statements are "unprotected for their own sake"). Rather, false statements of fact receive only "a measure of strategic protection," in appropriate contexts, in order to

ensure that regulation of such statements does not unduly inhibit fully protected speech. *Gertz*, 418 U.S. at 342; see *id.* at 341.

The Court has therefore upheld content-based restrictions on false statements of fact that are supported by a government interest and that accommodate the government's interest and First Amendment concerns by providing adequate "breathing space" for fully protected speech. See *New York Times Co.*, 376 U.S. at 272 (citation omitted). The Court has followed this approach in a variety of contexts, including defamation, see *ibid.*; fraud, see *Illinois, ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); intentional infliction of emotional distress through false statements, see *Hustler*, 485 U.S. at 53, 56; false-light invasion of privacy, see *Hill*, 385 U.S. at 388-389; and liability for baseless lawsuits, see *BE&K Constr. Co.*, 536 U.S. at 531 (stating that baseless lawsuits have been analogized to false statements and that the Court has allowed regulation in a manner that is "consistent" with "'breathing space' principles").[2]

b. In the defamation context, for instance, the Court's decisions seek to "accommodat[e]" the "strong and legitimate state interest" in compensating individuals for injury to reputation with First Amendment concerns. *Gertz*, 418 U.S. at 342, 348. Absent that state interest, the Court noted, it would have "embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Id.* at 341; see *Time, Inc.* v. *Firestone*, 424 U.S. 448, 456 (1976). "[T]he proper accommoda-

[2] In addition, in the distinct context of commercial speech, the government may regulate not only false, but also deceptive and misleading, speech. See *Virginia State Bd.*, 425 U.S. at 771-772 & n.24.

tion," the Court has held, is one that allows States to limit defamation through private tort actions while "assur[ing] to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz*, 418 U.S. at 342 (citation omitted); *New York Times Co.*, 376 U.S. at 272.

To provide the necessary "breathing space" for fully protected speech, the Court has imposed several limitations on defamation actions. See *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 12-17 (1990). First and foremost, the Court has held that, because a scienter requirement generally cabins the chilling effect of a defamation action, such suits may be based on statements made with knowledge of falsity or actual malice. See *New York Times Co.*, 376 U.S. at 279-280; *Gertz*, 418 U.S. at 342, 347. Second, the defamation plaintiff must bear the burden of proving both falsity and fault by clear and convincing evidence. See *Milkovich*, 497 U.S. at 15-16. Third, because the analysis "attempt[s] to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment," it is "appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved." *Gertz*, 418 U.S. at 349; see *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 774 (1986). In *Gertz*, therefore, the Court held that the state interest in compensating defamation-related injury did not justify remedies that were insufficiently related to that interest—including presumed and punitive damages for negligently false statements—because they would "unnecessarily exacerbate[]" the danger of chilling effects. 418 U.S. at 349-350; see also *Herbert*, 475 U.S. 169-170 (permitting discovery into editorial process because doing so furthered

interest in punishing knowing or reckless false statements without causing undue chill).

c. Similarly, in the fraud context, the Court has upheld content-based restrictions on false speech that serve a strong government interest—the interest in preventing and punishing fraud that "has always been recognized in this country and is firmly established," *Donaldson* v. *Read Magazine*, 333 U.S. 178, 190 (1948) —where the restrictions "provide sufficient breathing room for protected speech." *Telemarketing Assocs.*, 538 U.S. at 620. The necessary breathing room is supplied by elements such as scienter, materiality, and reliance. *Ibid.* These ensure that fraud prohibitions do not chill fully protected speech and "properly tailor[]" the limitations to serve the government's interest in protecting the integrity of transactions and compensating injury. See *ibid.*; *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 794-795, 800 (1988) (properly tailored fraud laws "are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored").

d. The Court has applied essentially the same analysis to other restrictions on false factual statements. The Court has treated baseless lawsuits as "analogous to false statements," *BE&K Constr. Co.*, 536 U.S. at 530-531 (internal quotation marks and citation omitted), and it has permitted regulation of objectively baseless suits motivated by an unlawful purpose in view of the "strong federal interest in vindicating the rights protected by the national labor laws," *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743-744 (1983). That rule, the Court has noted, is "consistent with * * * 'breathing space' principles." *BE&K Constr. Co.*, 536 U.S. at

531. Similarly, the Court has held that false-light tort actions designed to prevent misappropriation of one's image are permissible if they contain a scienter requirement. See *Hill*, 385 U.S. at 390-391. And the Court has held that the "State's interest in preventing emotional harm" justifies permitting tort suits for intentional infliction of emotional distress based on false statements, so long as the action requires a showing of actual malice in order to provide "'breathing space' to the freedoms protected by the First Amendment." *Hustler*, 485 U.S. at 53, 56.

2. The court of appeals therefore erred in applying strict scrutiny simply because it concluded that the speech prohibited by Section 704(b) does not fall within a category of speech that historically has been completely unprotected by the First Amendment. Instead, the court of appeals should have followed the "breathing space" analysis that this Court has applied to restrictions on false factual statements in numerous contexts. Under that approach, Section 704(b) is constitutional. The government has a strong—indeed, compelling—interest in protecting the reputation and integrity of its military honor system against knowingly false claims, and the Act appropriately accommodates that interest and First Amendment concerns because it provides ample breathing room for protected speech.

a. The government has a "compelling interest * * * in preserving the integrity of its system of honoring our military men and women." App., *infra*, 37a. The military honors program serves two vital interests, both of which are undermined by false claims to have won a medal.

First, military medals and decorations recognize and express gratitude for acts of heroism and sacrifice as

well as exemplary military service. The government intends that military honors should bestow a rare degree of prestige on their bearers and convey to the public the high regard in which the government holds the individuals who have sacrificed in service to the Nation. To that end, Congress and the armed services have developed rigorous standards and procedures for awards. See pp. 4-6, *supra*; *Awards Hearing* 21, 81 (statement of Michael L. Dominguez, Principal Deputy Undersecretary of Defense for Personnel and Readiness). Valor awards, such as the Medal of Honor, are conferred only on those who have committed extraordinary acts of heroism. Through those rigorous criteria, Congress and the armed services ensure that each award symbolizes gratitude and bestows honor only for the most deserving. See *Medal of Honor Report* 14 ("It is precisely *because* of these legalistic safeguards that the Medal of Honor is a symbol of such glorious tradition today.").

A false claim to have been awarded a military medal misappropriates the prestige and honor associated with that medal. The cumulative effect of such claims is, as Congress found, to dilute and "damage the reputation and meaning of such decorations and medals." Stolen Valor Act § 2(1), 120 Stat. 3266. In the aggregate, false representations threaten to make the public skeptical of any claim to have been awarded a medal. They also undercut the government's screening to ensure that the award recipients, the conduct for which the honors are conferred, and the recipients' subsequent military record are deserving of the government's highest honors. See pp. 4-6, *supra*. These cumulative effects diminish the awards' effectiveness in conferring prestige and honor on those who actually have been awarded medals. The government therefore has a compelling interest in

preventing and punishing the misappropriation of military honors. Cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522 (1987) (stating that the government has an interest in preventing misappropriation of the term "Olympics").

Second, military awards, by "recognizing acts of valor, heroism, and exceptional duty and achievement," serve vital purposes within the armed services. *Awards Hearing* 24 (statement of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force). The military awards program "fosters morale, mission accomplishment and esprit de corps" among service members. *Ibid.*; see *id.* at 26 (statement of Brig. Gen. Richard P. Mills, Dir., Personnel Mgmt. Div., Manpower and Reserve Affairs, HQ, U.S. Marine Corps) (emphasizing the "importance of a viable and robust military combat awards system in maintaining morale, esprit de corps, and pride in [one's] fellow Marines"); Marine Corps Order 1650.19J at para. 2; Army Reg. 600-8-22, ch. 1, § 1-1; SECNAV Instruction 1650.1H, § 3-1; AFPD 36-28, para. 2. The award of valor medals is particularly important during wartime; for instance, as General George C. Marshall wrote in describing his advocacy during World War II for the creation of the Bronze Star, the medal would be used to "sustain morale and fighting spirit in the face of continuous operations and severe losses." Charles P. McDowell, *Military and Naval Decorations of the United States* 171 (1984). Indeed, the importance of medals in fostering these values among service members has been recognized since General Washington created a valor award to "cherish a virtuous ambition in his sol-

diers, as well as to foster and encourage every species of military merit."[3] *General Orders* 35.

False claims to have received military awards undermine their important function within the armed services. In order to preserve the prestige and honor associated with military awards within the services, the military prosecutes active-duty service members who falsely claim or wear awards that they have not received under the Uniform Code of Military Justice. See 10 U.S.C. 934 (offense of "conduct of a nature to bring discredit upon the armed forces"); see also, *e.g.*, *United States* v. *Avila*, 47 M.J. 490 (1998) (defendant wore and used falsified documents to claim that he had won a Bronze Star). These efforts are undermined if false claims are rampant outside of the military.

b. Section 704(b) properly accommodates this compelling government interest and First Amendment concerns because it provides ample "breathing space" for fully protected speech. *New York Times Co.*, 376 U.S. at 272 (citation omitted).

Most importantly, Section 704(b) does not inhibit expression of opinion about military policy, the meaning of military awards, the values they represent, or any other topic of public concern. One can praise or criticize the military, its actions, or its award winners without restraint. The statute prohibits only knowing misrepre-

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[3] The court of appeals wrongly dismissed this established function of military awards as "unintentionally insulting" to service personnel. App., *infra*, 39a. It is common sense that those serving in the armed forces do not commit valorous acts purely in hopes of receiving a medal. But acknowledging that fact does not detract from the force of the armed forces' longstanding view that military awards are a vital means of inspiring higher performance and maintaining the morale necessary for effective unit performance.

sentations, see pp. 16-17, *supra*, on a particular personal subject matter. This scienter requirement provides "an extremely powerful antidote to the inducement to * * * self-censorship." *Gertz*, 418 U.S. at 342; *Telemarketing Assocs.*, 538 U.S. at 620.

A number of the statute's other characteristics reinforce the scienter requirement, making it virtually certain that no one would refrain from engaging in truthful speech about medals in order to avoid the possibility of prosecution. The statute prohibits only a discrete category of misrepresentations of fact about the speaker himself. A person is unlikely to be mistaken about whether he has received a military medal, and in all events, the accuracy of any such claim is objectively verifiable. As a result, there will rarely be uncertainty about the falsity of the representation or a dispute about the speaker's knowledge, and thus there is little likelihood that people will refrain from truthful speech about military awards out of "doubt whether [truth or lack of knowledge] can be proved in court or fear of the expense of having to do so." *New York Times Co.*, 376 U.S. at 279; cf. *Virginia State Bd.*, 425 U.S. at 772 n.24 (the verifiable nature of commercial assertions means that less breathing room is necessary to "insure that the flow of truthful and legitimate commercial information is unimpaired"). The government must, moreover, establish any disputed facts beyond a reasonable doubt. See *Telemarketing Assocs.*, 538 U.S. at 620 ("Exacting proof requirements" in fraud actions, where government must prove fraud by clear and convincing evidence, provide "sufficient breathing room for protected speech.").

In addition, a speaker need not fear that a Stolen Valor Act prosecution will be used to punish disfavored speech. Because the line between a knowingly false

award-related claim and all other statements—about military service, valorous acts, military policy, or the like—is well-defined and objective, the government could not use Section 704(b) as a means of imposing its own view of "truth" or punishing criticism. Cf. *New York Times Co.*, 376 U.S. at 272. Indeed, the narrow category of statements prohibited by Section 704(b) has no intrinsic relation to criticism of government—one can falsely claim to have won a medal in the context of praising or criticizing official policy—or any other particular viewpoint.

Section 704(b)'s prohibition on all knowingly false claims to have won a military award also "reach[es] no farther than is necessary." *Gertz*, 418 U.S. at 349. First, the provision targets only those representations that reasonably can be understood as factual claims to have won a medal—the type of misappropriation that dilutes the meaning and value of the medals. Second, although the court of appeals emphasized that Section 704(b) does not require that the misrepresentation at issue have caused particularized injury, App., *infra*, 30a-35a, its prohibition of all such misrepresentations is necessary because it is the cumulative effect of false claims that causes the harm that Congress sought to remedy. See pp. 29-30, *infra*; App., *infra*, 74a (Bybee, J., dissenting) (false claims give rise to the misimpression that honors are more frequently awarded than they actually are, thereby "dilut[ing] the select group of those who have earned the nation's gratitude for their valor").

C. Section 704(b) Also Can Be Upheld Under Strict Scrutiny

Even if the court of appeals was correct in subjecting Section 704(b) to strict scrutiny, the statute survives that test.

As the court acknowledged, the government has a compelling interest in protecting the integrity of its military award system against knowingly false claims that dilute the meaning of the awards. See App., *infra*, 37a; pp. 23-26, *supra*.

The court of appeals held that Section 704(b) is not narrowly tailored because it doubted that "criminally-punishing lies about having received Congressionally-awarded medals is the best and only way to ensure the integrity of the medals." App., *infra*, 38a. The court suggested that it is speculative to conclude that the meaning of military awards is harmed by those who lie about having received one. *Ibid.* But it is common sense that false representations have the tendency to dilute the value and meaning of military awards. That is why Congress historically has acted to protect military awards from misappropriation. See *Medal of Honor Report* 4 (detailing protection efforts beginning in 1869).

The court also incorrectly assumed that the misrepresentations covered by Section 704(b) are easily discovered and refuted by the public. App., *infra*, 37a-38a. Some misrepresentations may be promptly investigated and exposed, but many others are not discovered for substantial amounts of time, if ever. See, *e.g.*, *United States* v. *Hinkson*, 585 F.3d 1247, 1254-1256 (9th Cir. 2009) (en banc) (witness used fraudulent military records to fool prosecutors, judge, and defense attorneys with false claim of having won Purple Heart, and district

court initially could not determine based on military records whether the claims were true or false). In addition, public refutation is necessarily an inadequate solution because some military records have been lost, rendering some claims unverifiable. See Office of the Undersec'y of Defense, *Report to the Senate and House Committees on a Searchable Military Valor Decorations Database* 5-8 (2009). Even if those particular false claims cannot be prosecuted as a result of lost records, Section 704(b) deters them in the first place. And because the medals' meaning is eroded by the aggregate effect of these false claims, including claims that are less susceptible to counterspeech, preventing that cumulative harm requires prosecuting the claims that are provably false in order to deter all knowingly false claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-50345

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

XAVIER ALVAREZ, AKA JAVIER RGK-1 ALVAREZ,
DEFENDANT-APPELLANT

Filed: Aug. 17, 2010

OPINION

Before: T.G. NELSON, JAY S. BYBEE, and MILAN D. SMITH, JR., Circuit Judges.

M. SMITH, Circuit Judge.

Defendant-Appellant Xavier Alvarez conditionally pleaded guilty to one count of falsely verbally claiming to have received the Congressional Medal of Honor, in violation of the Stolen Valor Act (the Act), 18 U.S.C.

§ 704(b), (c),[1] reserving his right to appeal the Act's constitutionality.

The Act, as presently drafted, applies to pure speech; it imposes a *criminal* penalty of up to a year of imprisonment, plus a fine, for the *mere utterance or writing* of what is, or may be perceived as, a false statement of fact—without anything more.

The Act therefore concerns us because of its potential for setting a precedent whereby the government may proscribe speech solely because it is a lie. While we agree with the dissent that most knowingly false factual speech is unworthy of constitutional protection and that, accordingly, many lies may be made the subject of a criminal law without creating a constitutional problem, we cannot adopt a rule as broad as the government and dissent advocate without trampling on the fundamental right to freedom of speech. *See* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1109 (2006) ("[A]ccepting unlimited government power to prohibit all deception in all circumstances would invade our rights of free expression and belief to an intolerable degree, including most notably—and however counterintuitively—our rights to personal and political self rule."). Rather we hold that regulations of

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[1] Although predecessor versions have existed since 1948, the current form of the Act was passed in 2006. In that year, Congress found that "[f]raudulent claims surrounding the receipt of the Medal of Honor [and other Congressionally authorized military medals, decorations, and awards] damage the reputation and meaning of such decorations and medals," and that "[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), (3), 120 Stat. 3266, 3266 (2006).

false factual speech must, like other content-based speech restrictions, be subjected to strict scrutiny unless the statute is narrowly crafted to target the type of false factual speech previously held proscribable because it is not protected by the First Amendment.

The rule the government and dissent urge us to apply in order to uphold the Act would, if adopted, significantly enlarge the scope of existing categorical exceptions to First Amendment protection. All previous circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements that serve to narrow what speech may be punished. Indeed, if the Act is constitutional under the analysis proffered by Judge Bybee, then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway. The sad fact is, most people lie about some aspects of their lives from time to time. Perhaps, in context, many of these lies are within the government's legitimate reach. But the government cannot decide that some lies may not be told without a reviewing court's undertaking a thoughtful analysis of the constitutional concerns raised by such government interference with speech.

Finding no appropriate way to avoid the First Amendment question Alvarez poses, we hold that the speech proscribed by the Act is not sufficiently confined to fit among the narrow categories of false speech previously held to be beyond the First Amendment's protective sweep. We then apply strict scrutiny review to the

Act, and hold it unconstitutional because it is not narrowly tailored to achieving a compelling governmental interest.

FACTUAL AND PROCEDURAL BACKGROUND

Xavier Alvarez won a seat on the Three Valley Water District Board of Directors in 2007. On July 23, 2007, at a joint meeting with a neighboring water district board, newly-seated Director Alvarez arose and introduced himself, stating "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."

Alvarez has never been awarded the Congressional Medal of Honor, nor has he spent a single day as a marine or in the service of any other branch of the United States armed forces. In short, with the exception of "I'm still around," his self-introduction was nothing but a series of bizarre lies.

Alvarez's misrepresentations during the 2007 water district board meeting were only the latest in a long string of fabrications. Apparently, Alvarez makes a hobby of lying about himself to make people think he is "a psycho from the mental ward with Rambo stories." The summer before his election to the water district board, a woman informed the FBI about Alvarez's propensity for making false claims about his military past. Alvarez told her that he won the Medal of Honor for rescuing the American Ambassador during the Iranian hostage crisis, and that he had been shot in the back as he returned to the embassy to save the American flag. Alvarez reportedly told another woman that he was a Vietnam veteran helicopter pilot who had been shot

down but then, with the help of his buddies, was able to get the chopper back into the sky.

In addition to his lies about military service, Alvarez has claimed to have played hockey for the Detroit Red Wings, to have worked as a police officer (who was fired for using excessive force), and to have been secretly married to a Mexican starlet. As the district court observed, Alvarez "live[s] in a world, a make-believe world where [he] just make[s] up stories all the time . . . . [T]here's no credibility in anything [he] say[s]."

After the FBI obtained a recording of the water district board meeting, Alvarez was indicted in the Central District of California on two counts of violating 18 U.S.C. § 704(b), (c)(1). Specifically, he was charged with "falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor." Alvarez appears to be the first person charged and convicted under the present version of the Act.

Alvarez moved to dismiss the indictment, claiming that the Act is unconstitutional both on its face and as applied to him. The district court denied the motion. Alvarez then pleaded guilty to the first count, reserving his right to appeal the First Amendment question. He was sentenced to pay a $100 special assessment and a $5,000 fine, to serve three years of probation, and to perform 416 hours of community service. This case addresses Alvarez's timely appeal of the constitutional issue.

JURISDICTION AND STANDARD OF REVIEW

Alvarez brings both facial and as-applied[2] challenges to the validity of the Act under the First Amendment. We review the constitutional question de novo. *See Perry v. L.A. Police Dep't*, 121 F.3d 1365, 1367-68 (9th Cir. 1997).

We have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

The Act provides:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b). The prescribed prison term is enhanced to one year if the decoration involved is the Congressional Medal of Honor, a distinguished-service

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[2] Because, as described further *infra*, the Act is so broadly drafted, the government was not required to prove anything before the district court except that Alvarez made a false statement about his having received the Congressional Medal of Honor—to which Alvarez pleaded guilty. Accordingly, we know very little about what other evidence the government might have been able to introduce in order to prove that Alvarez's particular statements were unprotected. For instance, some evidence in the record suggests he might have made the false claim at issue, or similar misrepresentations, in order to fraudulently obtain certain benefits.

cross, a Navy cross, an Air Force cross, a silver star, or a Purple Heart. *Id.* § 704(c), (d).

I

The Act proscribes false verbal or written representations about one's being awarded Congressionally authorized military honors and decorations. The parties do not dispute that the Act "seek[s] to regulate 'only . . . words.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)). Moreover, the Act targets words about a specific subject: military honors. The Act is plainly a content-based regulation of speech.

Content-based speech restrictions ordinarily are subjected to strict scrutiny. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). However, there is an exception to the ordinary rule for "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). As explained recently by the Supreme Court in *United States v. Stevens*:

> "From 1791 to the present," . . . the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." These "historic and traditional categories long familiar to the bar[ ]" [ ] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. . . .

— U.S. —, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (internal citations omitted); *see also Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (explaining that unprotected speech includes "the lewd and obscene, the profane,[3] the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (listing, in defamation case, other low value speech categories as including: "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business" (footnotes omitted)).

The primary argument advanced by the government, and our dissenting colleague, is that the speech targeted by the Act—demonstrably false statements about having received military honors—fits within those "well-defined" and "narrowly limited" classes of speech that are historically unprotected by the First Amendment. The government and the dissent rely on *Gertz v. Robert Welch, Inc.* and its progeny for the proposition that "the erroneous statement of fact is not worthy of constitutional protection." 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). In *Gertz*, the Court classified false statements of fact as "belong[ing] to that category of utterances" that "'are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 340, 94 S. Ct. 2997 (quoting

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[3] Since *Chaplinsky*'s list is outdated, *see Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (holding profanity is protected by the First Amendment), we find the current list in *Stevens* to be the most pertinent.

Chaplinsky, 315 U.S. at 572, 62 S. Ct. 766). Thus, the government and the dissent conclude, regulations of false factual speech may be proscribed without constitutional problem—or even any constitutional scrutiny.

We disagree. *Gertz* does not stand for the absolute proposition advocated by the government and the dissent. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 664, 123 S. Ct. 2554, 156 L. Ed. 2d 580 (2003) (Stevens, J., concurring in dismissal of writ as improvidently granted) (noting that the Court's statement in *Gertz* that false statements of fact are unprotected speech is "perhaps overbroad[ ]"). Rather, *Gertz*'s statement that false factual speech is unprotected, considered in isolation, omits discussion of essential constitutional qualifications on that proposition.

It has long been clear that First Amendment protection does not hinge on the truth of the matter expressed, *see Sullivan*, 376 U.S. at 271, 84 S. Ct. 710 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . . "), nor does it hinge on the distinction between "facts" and "ideas," *see Nike*, 539 U.S. at 678, 123 S. Ct. 2554 (Breyer, J., dissenting from dismissal of writ as improvidently granted) ("That the [document containing false statements] is factual in content does not argue against First Amendment protection, for facts, sometimes facts alone, will sway our views on issues of public policy."). Although statements characterized by *both* falsity and factualness have never been protected "for [their] own sake," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), the "First Amendment requires that we protect some falsehood in order

to protect speech that matters," *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997. As eloquently explained in *Sullivan*,

> [t]o persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and *even to false statement*. But the people of this nation have ordained in the light of history, that, *in spite of the probability of excesses and abuses*, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> . . . *[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive.*

376 U.S. at 271-72, 84 S. Ct. 710 (internal quotation marks and ellipsis omitted) (emphases added). Thus, while some false factual speech may be proscribable, the Supreme Court has shown that not all of it is. We next consider how the distinction is made.

II

We begin by noting our rejection of the government's suggestion that because "[f]alse statements of fact are particularly valueless," *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988), "Congress may prohibit false statements of fact unless immunity has been carved out or should be carved out because the First Amendment requires protection of some falsehood in order to protect speech that matters." In other words, the government contends that there is no protection for false statements of fact unless it can be shown, in a particular case, that there should be.

Contrary to the dissent's view, we cannot adopt the government's approach as the general rule for false factual speech without turning customary First Amendment analysis on its head.

First, under the government's proposed approach, it would effectively become the speaker's burden to prove that his false statement should be protected from criminal prosecution. That approach runs contrary to Supreme Court precedent. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."); *see also Sullivan*, 376 U.S. at 271, 84 S. Ct. 710 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . especially one that puts the burden of proving truth on the speaker.").

Second, the government's approach would give it license to interfere significantly with our private and public conversations. Placing the presumption in favor of regulation, as the government and dissent's proposed rule does, would steadily undermine the foundations of the First Amendment. In *Cohen v. California*, the Court rejected state regulation of profanity because "the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). This case is to that extent analogous. How, based on the principle proposed by the government, would one distinguish the relative value of

lies about one's receipt of a military decoration from the relative value of any other false statement of fact?[4] The government argues that the "protection of false claims of receipt of military honors is not necessary to a free press, to free political expression, or otherwise to promote the marketplace of ideas." But in nearly *every* case, an isolated demonstrably false statement will be not be considered "necessary" to promoting core First Amendment values, and will often be contrary to it. In nearly every case, the false statement will be outweighed by the perceived harm the lie inflicts on the truth-seeking function of the marketplace of ideas. Using such an approach, the government would almost always succeed. However, such an approach is inconsistent with the maintenance of a robust and uninhibited marketplace of ideas. *See Stevens*, 130 S. Ct. at 1585 (explaining that the government's suggestion that

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[4] One possible answer to this question is to use the mode of analysis outlined in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), which holds that even entirely unprotected content cannot be targeted on the basis of view-point. Even here, given that one could frame the Congressional intent behind the Act as intending to prevent telling lies that tend to disparage military, concerns about possible viewpoint discrimination may be legitimate. However, laws targeting false statements of *fact*, including this one, are unlikely to *directly* express or relate to an identifiable viewpoint, meaning that the exception in *R.A.V.* for cases in which "there is no realistic possibility that official suppression of *ideas* is afoot," *id.* at 390, 112 S. Ct. 2538 (emphasis added), would probably apply. Thus, given the difficulty of identifying the potential viewpoint discrimination afoot in laws targeting false statements about simple, demonstrable facts, we do not rely primarily on *R.A.V.* to sort between permissible and impermissible restrictions on speaking false statements of fact. We acknowledge, however, that *R.A.V.* might help us avoid plunging down a logical slippery slope.

"[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs" is "startling and dangerous"). "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.* The language from *Chaplinsky*, borrowed in *Gertz* to establish that false factual statements are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766, "do[es] not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary [.]" *Stevens*, 130 S. Ct. at 1586.[5]

Profanity and deliberately false statements of fact rarely contribute meaningfully to public debate over important issues, but

> [t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended *to remove governmental restraints* from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us. . . .

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[5] Although the dissent denies the proposed rule would result in ad hoc balancing, his own analysis shows that it does. *See* Dissent at p. 1233 (explaining that the Act does not cover speech that matters because "the harm from public officials outright lying to the public on matters of public record should be obvious" and that "our public discourse will not be worse for the loss" caused by chilling "false autobiographical claims by public officials such as Alvarez").

> . . . We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Cohen, 403 U.S. at 24-25, 91 S. Ct. 1780 (emphasis added).

There is certainly no unbridled constitutional right to lie such that any regulation of lying must be subjected to strict scrutiny. However, the right to speak and write whatever one chooses—including, to some degree, worthless, offensive, and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment. The dissent accuses us of confusing rules with exceptions, but with due respect, we disagree with his postulate that we must commence our constitutional analysis with the understanding that all false factual speech is unprotected. The fundamental rule is found in the First Amendment itself: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Any rule that certain speech is not protected by this foundational principle is the exception, which may in turn be subject to other exceptions to protect against such exceptions swallowing the rule.

In other words, we presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie). Though such an approach may

result in protection for a number of lies, which are often nothing more than the "distasteful abuse of [the First Amendment] privilege," *Cohen*, 403 U.S. at 25, 91 S. Ct. 1780, it is constitutionally required because the general freedom from government interference with speech, and the general freedom to engage in public and private conversations without the government injecting itself into the discussion as the arbiter of truth, contribute to the "breathing space" the First Amendment needs to survive. *See* Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1, 21-22 (2008). "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" *Sullivan*, 376 U.S. at 270, 84 S. Ct. 710 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 130 S. Ct. at 1585.

III

If the speech targeted by the Act is to be declared among those classes of speech which can be prohibited without any constitutional problem (the exceptions to the First Amendment), the speech must fit within those "historical and traditional categories long familiar to the bar." *Id.* at 1584 (internal quotation marks omitted).

We find no authority holding that false factual speech, as a general category unto itself, is among them.[6]

A

Gertz involved a libel action by a private citizen against a newspaper for the newspaper's reckless printing of an accusation that the plaintiff was a Communist. 418 U.S. at 326-27, 94 S. Ct. 2997. The Court began with the "common ground" that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 339-340, 94 S. Ct. 2997 (quoting *Sullivan*, 376 U.S. at 270, 84 S. Ct. 710). But the Court did not end there. Rather, it emphasized that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate." *Id.* at 340, 94 S. Ct. 2997. Therefore, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341, 94 S. Ct. 2997. To distinguish between the falsehood related to a matter of public concern that is

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[6] Of course, in the area of commercial speech, the analysis that follows might be very different. Here, there is no suggestion that the Act targets commercial speech, and therefore we do not address commercial speech given the unique way in which it is treated under the First Amendment. However, we are additionally persuaded that upholding the Act would require a novel extension of *Gertz* by the fact that, *even in the context of commercial speech*, knowingly false factual speech about a matter of public concern is potentially entitled to heightened First Amendment scrutiny. *See Nike*, 539 U.S. 654, 123 S. Ct. 2554, 156 L. Ed. 2d 580 (dismissing—with a highly fractured Court—certiorari as improvidently granted in a case involving the question of whether false speech with both commercial and public interest aspects is entitled to a degree of First Amendment protection).

protected and that which is unprotected, *Gertz* held that there must be an element of fault. *Id.* at 347, 94 S. Ct. 2997. Indeed, the Court has consistently held that when a speaker publishes a false statement of fact about a matter of public concern, such a statement can be *punished* only upon some showing of *malice* (as opposed to mere negligence),[7] because the malice requirement avoids the potential for punishing speakers who simply make innocent errors. *See Sullivan*, 376 U.S. at 283, 84 S. Ct. 710. The First Amendment is concerned with preventing punishment of innocent mistakes because the prospect of punishment for such speech "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997. Thus, many false factual statements are shielded by the First Amendment *even under Gertz*, regardless of how valueless they may be. This is emphasized in *Garrison v. Louisiana*, in which the Court clarified "the *knowingly* false statement . . . do[es] not enjoy constitutional protection." 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) (emphasis added); *see also Sullivan*, 376 U.S. at 283, 84 S. Ct. 710.

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[7] A false statement of fact can be punished upon a showing of mere negligence in the context of purely private defamation. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985). Because we take the statements at issue here to be of public concern, and because a violation of the Act calls for the imposition of a criminal penalty on the violator for speaking about a matter of public concern, an element of malice (*at least* reckless disregard for the truth or falsity of the statement) is necessary to its constitutionality, assuming defamation jurisprudence even governs this case.

Moreover, *Garrison*'s clarification is not the only relevant refinement. In defamation jurisprudence, the question has never been simply whether the speech "forfeits [First Amendment] protection by the falsity of some of its factual statements." *Sullivan*, 376 U.S. at 271, 84 S. Ct. 710. The question is always whether the speech forfeits its First Amendment protection as a result of its falsity "*and by its alleged defamation of [the plaintiff]*." *Id.* (emphasis added). In other words, in a defamation case, a threshold question is whether the false speech at issue is *defamatory*, meaning that the defamer's false statement is the proximate cause of an irreparable[8] harm to another's reputation. See *Gertz*,

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[8] On the importance of irreparability, *see infra* pp. 1207-11, 1216-17. The dissent argues at length that we have conjured up this harm element out of whole cloth, *see* Dissent at p. 1234, but it comes directly from several of the cases about "unprotected" speech. *See, e.g., Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (identifying fighting words as "those which by their very utterance inflict *injury* or tend to incite an immediate breach of the peace") (emphasis added); *Gertz*, 418 U.S. at 347, 94 S. Ct. 2997 (describing defamation as "injurious"). We do not mean to suggest, however, that harm is necessarily a required element for *all* unprotected speech regulations (although we find it interesting that it is present in many of them); rather, we note here only that it is a required element of defamation. Defamation, like every "unprotected" category, involves thoughtful and unique definitional analysis, *see infra* n.9. Even obscenity doctrine, which the dissent argues includes no harm element, still requires the statute to define "obscenity" in conformity with the constitutional rule. *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) (reaffirming that obscenity is unprotected, but holding the an anti-obscenity statute must be carefully drafted or construed to meet First Amendment standards). Thus, if defamation law supplies the rule to be applied in this case, we cannot ignore that the definition of defamation includes injury to reputation. *See, e.g., Gertz*, 418 U.S. at 347, 94 S. Ct. 2997; *Sullivan*, 376 U.S. at 271, 84 S. Ct. 710; *Dun & Bradstreet*, 472 U.S. at 762, 105 S. Ct. 2939.

418 U.S. at 327, 94 S. Ct. 2997 (holding that "so long as they do not impose liability without fault, the States may . . . [impose] liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual").

Since the *Stevens* Court saw fit to name defamation specifically, rather than false statements of fact generally, as the historical category excluded from constitutional protection, we believe the historical category of unprotected speech identified in *Gertz* and related law is defamation, not all false factual speech. The dissent erroneously relies on *Gertz* for its statement that false factual speech is valueless and unprotected, while ignoring what *Gertz* actually *held*, and how the Court in *Gertz* framed the issues and carefully analyzed the First Amendment questions raised in the case. Our dissenting colleague does not, because he cannot, provide any citation to relevant authority that follows his suggested approach, in which the Court characterizes a law as targeting false factual speech under the language of *Gertz* and resolves the case in the government's favor without engaging in any First Amendment analysis at all.[9] Unlike

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[9] If Judge Bybee is correct, the opinion in this case would need to be no more than a few paragraphs in length. *See* Dissent at pp. 1231-32. Starting with the premise that false statements are unprotected, he believes it therefore follows that the First Amendment presumptively does not apply. He takes one step back to consider briefly whether there is any need to protect the particular false statements targeted by the Act in order to ensure robust political speech, and seeing none, concludes there is no First Amendment issue. The opinion would end there.

Of course, the First Amendment requires more. That is why even in "unprotected" speech cases, the First Amendment analysis is nonethe-

less rigorous. *See Sullivan*, 376 U.S. at 268, 84 S. Ct. 710 ("Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. *It must be measured by standards that satisfy the First Amendment.*") (footnotes omitted) (emphasis added); *see also Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (articulating First Amendment test for incitement); *Gooding*, 405 U.S. at 522, 92 S. Ct. 1103 (requiring fighting words restrictions to be "carefully drawn"); *Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 619, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003) (requiring fraud statute to be properly tailored); *Miller v. California*, 413 U.S. 15, 23-24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (articulating "carefully limited" test for obscenity regulations); *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (engaging in First Amendment analysis to determine test for true threat regulations); *Va. State Bd. of Pharmacy*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (applying intermediate scrutiny to commercial speech). That is also why restrictions on "unprotected" speech are at times invalidated. *See, e.g., Cohen*, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (rejecting, on First Amendment grounds, restrictions of profanity); *Gooding*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (striking down fighting words statute); *Hustler*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (prohibiting recovery for emotional distress in libel action); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (finding portions of Communications Decency Act invalid under the First Amendment). Thus, even if one agrees with the dissent that *Gertz* and its progeny requires the historical category of unprotected speech at issue here be defined as knowingly false factual speech per se, that is simply not enough to make the Act immune from First Amendment analysis. Judge Bybee's approach excepting "some falsehood" when it is necessary to protecting speech that matters reintroduces some First Amendment scrutiny into it, but we believe that approach is not sufficiently speech-protective for the reasons explained *supra* pp. 1205-06. If Judge Bybee is correct, then, we will need an entirely new constitutional rule for false speech regulations. Rather than guess what rule the Court would adopt for this newly-broadened category of unprotected

our dissenting colleague, we are not eager to extend a statement (often quoted, but often qualified) made in the complicated area of defamation jurisprudence into a new context in order to justify an unprecedented and vast exception to First Amendment guarantees.[10] Indeed, *Stevens* instructs us not to do so: "Our decisions [following *Chaplinsky*] cannot be taken as establishing a free-wheeling authority to declare new categories of speech outside the scope of the First Amendment." 130 S. Ct. at 1586.

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speech, we confine our review to previously defined unprotected categories.

[10] We are not persuaded that *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), is anything more than a variation on defamation jurisprudence. *Hoffman* applied the actual malice standard from *Gertz-Garrison-Sullivan* in a case involving a magazine's alleged creation of a false impression that a famous actor posed for a photograph. *Id.* at 1187; *cf. also Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) (holding constitutional a state law imposing civil liability for malicious false statements that invade a private individual's right of privacy). Although the asserted injury in *Hoffman* is not to reputation, but instead to a form of publicity rights, the interests at stake are sufficiently similar to defamation that the *Gertz-Garrison-Sullivan* framework can conceptually apply without a significant extension of the doctrine. When the only asserted injury is to the reputation of a *government institution*, the historical basis for finding that the "social interest in order and morality" outweighs the value of precluding government interference with speech is absent. *Chaplinsky*, 315 U.S. at 571-72, 62 S. Ct. 766; *see Gertz*, 418 U.S. at 341, 94 S. Ct. 2997 ("The need to avoid self-censorship by the news media *is . . . not the only societal value at issue.* If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." (emphasis added)).

With this constitutional background in mind, we next consider whether the Act fits into the defamation category. We assume that receipt of military decorations is a matter of public concern, as it primarily involves Congressional and military recognition of public service. The Act, however, does not require a malicious violation, nor does it contain any other requirement or element of scienter (collectively, a scienter requirement). Without a scienter requirement to limit the Act's application, the statute raises serious constitutional concerns under defamation jurisprudence because the First Amendment clearly prohibits criminally punishing negligent speech about matters of public concern. *See Gertz*, 418 U.S. at 340, 347, 94 S. Ct. 2997.

To avoid such a result, the government preemptively suggested at oral argument that a scienter requirement can be read into the Act. Adopting the government's suggestion (even though the Act presently includes no express scienter element) would require us to construe the Act to include a requirement that the government prove that the defendant spoke with malice. *See Staples v. United States*, 511 U.S. 600, 604-06, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994); *Osborne v. Ohio*, 495 U.S. 103, 115, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). If a scienter requirement would save the statute, we would be obliged to read it in if possible. *See Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993). Such an approach might be reasonable since most people know the truth about themselves, thereby permitting us to construe the Act to require a knowing violation. Indeed, the government charged Alvarez with *knowingly* making the false statement.

But that is not enough. The Court has never held that a person can be liable for defamation merely for spreading knowingly false statements. The speech must also be "injurious to a private individual." *Gertz*, 418 U.S. at 347, 94 S. Ct. 2997.

Of course, if we look beyond the text of the Act, there is a presumptive harm identified by Congress that might be analogized to the presumption of reputational harm made in defamation cases. Specifically, Congress made "Findings" that "fraudulent claims" about receipt of military honors "damage the reputation and meaning of such decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. at 3266; *see also* 151 Cong. Rec. S12684-01, S12688-99 (2005) (statement of Sen. Conrad). We do not believe the "Findings" make this a defamation statute.

First, while the "Findings" identify the injury the Act targets, they do not actually limit the *application* of the Act. There is no requirement in the Act that the government bear the burden to prove that the defendant's speech or writing proximately caused damage to the reputation and meaning of military decorations and medals. Although common law traditions suggest that we can sometimes presume damage in defamation cases, *see Gertz*, 418 U.S. at 349-402, 94 S. Ct. 2997, there is no readily apparent reason for assuming, without specific proof, that the reputation and meaning of military decorations is harmed every time someone lies about having received one. To the contrary, the most obvious reason people lie about receiving military honors is because they believe that their being perceived as recipients of such honors brings them acclaim, suggesting that generally the integrity and reputation of such honors remain

unimpaired. And notably, even in defamation cases, a "publication" is required, ensuring that liability attaches only to those falsehoods spoken under circumstances in which the harm could result. In this case, however, we cannot ignore the fact that *nothing* in the Act requires a showing of either (1) publicity or (2) victims. Alvarez made his statement in a water district board meeting; it would have made no difference under the Act if he had he made the statement in the privacy of his home at a family dinner.

More importantly, even if it were justifiable to presume that harm to the meaning and reputation of military decorations occurs whenever a false claim concerning their receipt or possession is made, the government may not restrict speech as a means of self-preservation. The right against defamation belongs to natural persons, not to governmental institutions or symbols. *See Sullivan*, 376 U.S. at 291, 84 S. Ct. 710 ("'[N]o court of last resort in this country has ever held, or even suggested, that prosecutions for libel *on government* have any place in the American system of jurisprudence.'" (quoting *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86, 88 (1923)) (emphasis added)). Preserving the value of military decorations is unquestionably an appropriate and worthy governmental objective that Congress may achieve through, for example, publicizing the names of legitimate recipients or false claimants,[11] creating educational programs, prohibiting the act of

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[11] Indeed, Congress and other organizations already make such lists publicly available. *See* Congressional Medal of Honor Society, Recipients, http://www.cmohs.org (last accessed Mar. 31, 2010); Congressional Medal of Honor Foundation, http://www.cmohfoundation.org (last accessed Mar. 31, 2010).

posing as a veteran to obtain certain benefits, or otherwise more carefully circumscribing what is required to violate the Act. But the First Amendment does not permit the government to pursue this sort of objective by means of a pure speech regulation like the one contained in the Act. *See Texas v. Johnson*, 491 U.S. 397, 418-20, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) ("To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest."); *see also Schacht v. United States*, 398 U.S. 58, 63, 90 S. Ct. 1555, 26 L. Ed. 2d 44 (1970) ("An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the Government during a dramatic performance. The last clause of [10 U.S.C. § 772(f)] denies this constitutional right to an actor who is wearing a military uniform by making it a crime for him to say things that tend to bring the military into discredit and disrepute.").

Finally, even assuming the Act prevents a harm legitimately preventable by means of a speech or writing restriction, to say that the Act in its current form fits within defamation doctrine would require us to ignore the *nature* of the harm against which the defamation law is intended to protect. A victim's right to recovery for defamation trumps the defamer's First Amendment interests because, when it comes to *defamatory* falsehoods, "the truth rarely catches up with a lie" so the "opportunity for rebuttal seldom suffices to undo harm." *Gertz*, 418 U.S. at 344 n.9, 94 S. Ct. 2997; *see also Hustler*, 485 U.S. at 52, 108 S. Ct. 876 (explaining that defamatory falsehoods "cause damage to an individual's reputation that cannot easily be repaired by counter-

speech, however persuasive or effective"). The harm caused by defamation is thought to be *irreparable* even when the truth is brought to light. Here, in contrast, when someone falsely claims to have been awarded a Congressionally-authorized medal, and his or her false claims are exposed as self-aggrandizing lies, scandal results, and counter-speech can vindicate the truth in a way the law presumes rebuttal of defamatory falsehoods cannot. Indeed, Alvarez was perceived as a phony even before the FBI began investigating him, and he has since been publicly humiliated in his community and in the press (one online article described him as an "idiot," and another post described him as a "jerk"). When valueless false speech, even proscribable speech, can best be checked with *more* speech, a law criminalizing the speech is inconsistent with the principles underlying the First Amendment. *See infra* pp. 1216-17.

Thus, the Act is not sufficiently analogous to an antidefamation law to bring it within the scope of the historical First Amendment exception for laws punishing defamation.

B

Moving beyond defamation, there are other of the historical categories that may involve false factual speech-fraud and, to a certain extent, speech that is integral to criminal conduct. It is obvious, however, that these categories also include limiting characteristics to what speech may be proscribed beyond mere falsity, just as defamation law does.

Fraud statutes must be precisely crafted to target only specific false statements that are likely to cause a bona fide harm.

> [I]n a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a [speaker] to fraud liability. . . . [T]o prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.

Ill. ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003).

Even laws about perjury or fraudulent administrative filings—arguably the purest regulations of false statements of fact—require at a minimum that the misrepresentation be willful, material, and uttered under circumstances in which the misrepresentation is designed to cause an injury, either to the proper functioning of government (when one is under an affirmative obligation of honesty) or to the government's or a private person's economic interests. *See, e.g., United States v. Dunnigan*, 507 U.S. 87, 94, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993) ("A witness testifying under oath or affirmation violates [the perjury statute, 18 U.S.C. § 1621] if she gives false testimony concerning a *material matter* with the *willful intent* to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." (emphases added)); 18 U.S.C. § 1035 (prohibiting *knowing and willful, material* false statements made *to obtain health care benefits*. (emphasis added)). Into this area of the law we would also place *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1262 (9th Cir. 1982) (holding

that the First Amendment does not protect *deliberately* misrepresenting facts *to an administrative body for anticompetitive purposes*).[12] Thus, falsity alone is not enough. The context must be well-defined.

In addition, impersonation statutes are drafted to apply narrowly to conduct performed in order to obtain, at a cost to another, a benefit to which one is not entitled. *See* 18 U.S.C. § 912 ("Whoever falsely *assumes or pretends* to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or *in such pretended character demands or obtains any money*, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both." (emphases added)).

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[12] *Clipper Express* supports the cautionary holding we reach today. In that case, we explained:

> The first amendment has not been interpreted to preclude liability for false statements. For example, defamatory statements can be made the basis for liability. 18 U.S.C. § 1001 imposes criminal penalties for knowingly and wilfully concealing or misrepresenting material facts before any department or agency of the United States. Courts uniformly punish perjury. As the Supreme Court stated in [*Gertz*, 418 U.S. at 340, 94 S. Ct. 2997], "there is no constitutional value in false statements of fact." Contrary to defendants' assertions, there is simply no basis to hold that deliberately misrepresenting facts to an administrative body for anticompetitive purposes enjoys blanket first amendment protection.

690 F.2d at 1261-62. We read *Clipper Express* to explain, as we have done herein, that although false factual speech is not protected for its own sake such that the First Amendment precludes its prosecution, laws prohibiting it must nonetheless target well-defined subsets of speech like defamation or fraud or other clearly-defined criminal conduct.

Since Congress apparently intended the Act to be used to stop fraud, comparing the Act to fraud laws strikingly illustrates the Act's infirmities. In a "properly tailored fraud action" "[f]alse statement alone does not subject a [speaker] to fraud liability." *Ill. ex rel. Madigan*, 538 U.S. at 620, 123 S. Ct. 1829. Rather, there must be proof the false statement was (1) knowing and intended to mislead, (2) material, and (3) did mislead. *Id.* The Act, even were we to read a "knowingly" element into it, *see supra* p. 1209, still lacks the critical materiality, intent to defraud, and injury elements. Indeed, Alvarez pleaded guilty simply to making a knowingly false statement. The government was not required to allege that the statement was material, intended to mislead, or most critically, *did* mislead the listener. Rather, the record here shows, if anything, Alvarez has no credibility whatsoever and that no one detrimentally relied on his false statement. Although we believe that Congress could revisit the Act to modify it into a properly tailored fraud statute, we are not permitted to suggest how it could be done, since such would be a "'serious invasion of the legislative domain.'" *Stevens*, 130 S. Ct. at 1592 (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995)). Accordingly, we cannot construe the Act as falling within the historical First Amendment exception for anti-fraud laws.

Somewhat relatedly, criminal conduct is not immunized "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949). Thus, laws focused on criminal conduct—like perjury or tax or administrative fraud or impersonating

an officer—raise no constitutional concerns even though they can be violated by means of speech. Unlike such uncontroversial criminal laws, however, the Act makes criminal the speech itself *regardless of any defining context* that assures us the law targets legitimately criminal conduct.[13] Here again, Alvarez was not prosecuted for impersonating a military officer, or lying under oath, or making false statements in order to unlawfully obtain benefits. There was not even a requirement the government prove he intended to mislead. He was prosecuted simply for saying something that was not true. Without any element requiring the speech to be related to criminal conduct, this historical exception from the First Amendment does not apply to the Act as drafted.

C

In sum, our review of pertinent case law convinces us that the historical and traditional categories of unprotected false factual speech have thus far included only certain *subsets* of false factual statements, carefully defined to target behavior that is most properly characterized as fraudulent, dangerous, or injurious conduct, and not as pure speech. We are aware of no authority holding that the government may, through a criminal law,

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[13] While it may seem unlikely anything but the most egregious violations of the Act would be prosecuted, we do not determine the constitutionality of the Act based on our assumptions of how prosecutors will, in their discretion, enforce it. *See Stevens*, 130 S. Ct. at 1591 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

prohibit speech *simply* because it is knowingly factually false.

Precedent makes clear that knowing factual error is insufficient "to remove the constitutional shield from criticism of official conduct." *Sullivan*, 376 U.S. at 273, 84 S. Ct. 710. Hence the historical rejection of the validity of the Alien and Sedition Act, which "made it a crime, punishable by a $5,000 fine and five years in prison, 'if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.'" *Id.* at 273-34, 84 S. Ct. 710 (quoting Sedition Act of 1798, 1 Stat. 596). Thus, even though some knowing false statements may be proscribed, that proscription cannot be universal.

Moreover, there can be no doubt that there is affirmative constitutional value in at least some knowingly false statements of fact. Satirical entertainment such as The Onion, The Daily Show, and The Colbert Report thrives on making deliberate false statements of fact. Such media outlets play a significant role in inviting citizens alienated by mainstream news media into meaningful public debate over economic, military, political and social issues. However, even if such satirical writings and shows did not invite attention to and comment about issues of "public importance," would anyone with even a rudimentary knowledge of First Amendment law seriously argue that the satirical, false statements frequently contained in such writing and programming are cate-

gorically outside First Amendment protection? *See Sullivan*, 376 U.S. at 279 n.19, 84 S. Ct. 710 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting John Stuart Mill, On Liberty 15 (Oxford: Blackwell 1947))). Further, whether it be method actors getting into character, satirists being ironic or sarcastic, poets using hyperbole, or authors crafting a story, creative persons often make factual statements or assertions which, as they are fully aware, are entirely untrue. Such creative uses of knowingly false speech are highly protected. *Cf. Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) (requiring obscenity statutes to apply only to works that "taken as a whole, do not have serious literary, artistic, political, or scientific value").

Thus, false factual speech as a general category is not, and cannot be, proscribed under threat of criminal prosecution. Although certain subsets of false factual speech have been declared unprotected, such classes of speech were developed as the result of thoughtful constitutional analysis of what other characteristics the speech must have before it can be proscribed without clashing with First Amendment protections. The Act does not fit neatly into any of those "well-defined" and "narrowly limited" classes of speech previously considered unprotected, and we thus are required to apply the highest level of scrutiny in our analysis.

IV

Before performing the customary First Amendment analysis, however, we consider alternatively what may perhaps be better authority for the view that the mali-

ciously stated false factual speech is historically unprotected—not *Gertz* and the unique universe of defamation jurisprudence, or the law of fraud, but *Schenck v. United States*, as suggested by Alvarez in his appeal. There, Justice Holmes famously noted that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919). Although *Schenck* was concerned with seditious speech, it is particularly instructive here, given that the "clear and present danger" test emerged from the "fire in a theater" hypothetical, which is quintessentially about a false statement of fact.

Generalizing from the "fire in a theater" hypothetical, Justice Holmes went on to hold that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." *Id.* (emphasis added). To the extent we are even free to look beyond defamation and fraud for a more general rule concerning prohibition of false factual speech, we agree with Alvarez that the rule from *Schenck* might supply a helpful guideline for defining the relevant subset of false speech that is historically unprotected.[14] Indeed, *Schenck*'s re-

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[14] The "clear and present danger" rule has long been criticized as being insufficiently protective of First Amendment freedoms when it comes to seditious and some other forms of speech. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 910-12 (1963). Indeed, the holding of *Schenck* itself, in which the Court upheld a prosecution for discouraging military enlistment, was accompanied by a strong dissent. However, our purpose here is only to articulate minimum requirements that must be met before a

quirements that any restricted speech be uttered under circumstances likely to be the proximate cause of an imminent harm within the scope of Congress' legitimate reach are highly relevant to the classes of false factual speech we have already identified—defamation, fraud, and speech integral to criminal conduct—and other classes of speech historically held to be unworthy of constitutional protection. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed to inciting or producing imminent lawless action* and *is likely to incite or produce such action*." (emphases added)); *Virginia v. Black*, 538 U.S. 343, 360, 363, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (permitting prohibition of "cross burnings done with the intent to intimidate" because "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker *directs a threat to a person . . . with the intent of placing the victim in fear* of bodily harm or death" (emphases added)); *Chaplinsky*, 315 U.S. at 573, 62 S. Ct. 766 ("It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, *the use in a public place* of words *likely to cause a breach of the peace*." (emphasis added)).

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false statement of fact can be removed from First Amendment protection under existing precedents. Some false statements of fact made with scienter and likely to cause a real harm might nonetheless deserve constitutional protection, such as the sort of malicious false speech targeted by the Alien and Sedition Act, *see infra* pp. 1213-14. In such a case, additional First Amendment scrutiny would obviously be required.

Following *Schenck*, then, we might articulate the class of false factual speech unprotected by the First Amendment to be that false factual speech which creates a clear and present danger of a harm Congress has a right to prevent. Assuming that the "clear and present danger" test is the more appropriate rule, as Alvarez urges us to do, we agree with him that the Act fails the test for the same reasons the Act is not analogous to anti-defamation laws.

As explained in *Schenck*, the power of the government to punish such speech involves careful consideration of "proximity and degree" of the harm. For the reasons already substantially described *supra* in Part III.A, the speech targeted by the Act does not pose any immediate and irreparable harm; any harm it does cause can be remedied by more speech. Further, the harm the Act identifies—damage to the reputation and meaning of military honors—is not the sort of harm we are convinced Congress has a legitimate right to prevent by means of restricting speech.

V

Having concluded that the Act does not fit within the traditional categories of speech excluded from First Amendment protection, we must subject it to strict scrutiny review. Indeed,

> [e]ven as to [the narrowly limited classes of speech noted in *Chaplinsky*] . . . because the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom[.]

> In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate the area only with narrow specificity.

Gooding, 405 U.S. at 522, 92 S. Ct. 1103 (internal quotation marks and citations omitted) (emphases added); *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (explaining that the First Amendment requires that statutes targeting the content of speech must be drafted with "precision"). The Court has always carefully considered the contours of regulations purporting to target "unprotected" speech; here, being unconvinced the Act even targets such "unprotected" speech, we are even more mindful of our obligation to ensure the statute is narrowly drawn.

The strict scrutiny standard of review is familiar: the government must show that the law is narrowly tailored to achieve a compelling governmental interest. *Citizens United v. Fed. Election Comm'n*, — U.S. — , 130 S. Ct. 876, 898, — L. Ed. 2d — (2010). A law is not narrowly tailored when less speech-restrictive means exist to achieve the interest. *See Reno*, 521 U.S. at 874, 117 S. Ct. 2329 (holding that although adult content is unprotected as to children, it is protected as to adults, so a law imposing a "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"). Even the dissent agrees that the Act fails strict scrutiny. Dissent at n.10.

The asserted governmental interest at issue in the Act is to prevent "fraudulent claims" about receipt of military honors, such claims causing "damage the reputation and meaning of such decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. at 3266; *see also* 151 Cong. Rec. S12684-01, S12688-99 (2005) (statement of Sen. Conrad). The government argues that the referenced interest is important to motivating our military. Especially at a time in which our nation is engaged in the longest war in its history, Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women for their service and, at times, their sacrifice.

However, the government has not proven here that the speech restriction is a narrowly tailored means of achieving that noble interest. In *Brown v. Hartlage*, the Supreme Court explained,

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech [or, in this case, the state interest in protecting the integrity of our national military decoration system] is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment "we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas." In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First

> Amendment remedy of "more speech, not enforced silence," thus has special force.

456 U.S. 45, 61, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (quoting *Gertz*, 418 U.S. at 339-404, 94 S. Ct. 2997, and *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring)) (ellipses in original). Here, Alvarez's lie, deliberate and despicable as it may have been, did not escape notice and correction in the marketplace. The preferred First Amendment remedy of "more speech" thus was available to repair any harm. *See also Johnson*, 491 U.S. at 419, 109 S. Ct. 2533 ("'[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'" (quoting *Whitney*, 274 U.S. at 377, 47 S. Ct. 641 (Brandeis, J., concurring))).

On this record it is speculative at best to conclude that criminally-punishing lies about having received Congressionally-awarded medals is the best and only way to ensure the integrity of such medals—after all, it seems just as likely that the reputation and meaning of such medals is wholly unaffected by those who lie about having received them. The greatest damage done seems to be to the reputations of the liars themselves. *See supra* pp. 1210-11; *see also United States v. Hinkson*, 611 F.3d 1098, 1114 (9th Cir. 2010) (W. Fletcher, J., dissenting from denial of en banc panel rehearing) (arguing that witness' credibility would have been impeached had his lie about having received a Purple Heart been ex-

posed to the jury). Further, even assuming that there is general harm to the meaning of military honors caused by numerous imposters, other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud. *See supra* pp. 1211-12.

Further, we agree with the reasoning of the District Court of Colorado that suggesting "that the battlefield heroism of our servicemen and women is motivated in any way . . . by considerations of whether a medal may be awarded simply defies . . . comprehension" and is "unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor." *United States v. Strandlof*, No. 09-cr-00497-REB, 2010 WL 2802691 (D. Colo. Jul. 16, 2010). Even if we were to make the unfounded assumption that our troops perform their riskiest missions in the hope of receiving the Medal of Honor, there is no evidence—nor any reasonable basis for assuming—that some people's false claims to have received the medal has a demotivating impact on our men and women in uniform.

In sum, honoring and motivating our troops are doubtless important governmental interests, but we fail to see how the Act is necessary to achieving either aim. Accordingly, we hold that the Act is not narrowly tailored to achieve a compelling governmental interest. As presently drafted, the Act is facially invalid under the First Amendment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar, without more.[15]

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[15] Judge Bybee emphasizes our failure to identify any other unconstitutional applications of the Act. Of course, we cannot identify other in-

We have no doubt that society would be better off if Alvarez would stop spreading worthless, ridiculous, and offensive untruths. But, given our historical skepticism of permitting the government to police the line between truth and falsity, and between valuable speech and drivel, we presumptively protect all speech, including false statements, in order that clearly protected speech may flower in the shelter of the First Amendment. The government has not rebutted that presumption here because the Act is not sufficiently analogous to traditional permissible restrictions on false speech.

CONCLUSION

In order to advance Congress's praiseworthy efforts to stop fraudulent claims about having received Congressionally authorized military honors, the government would have us extend inapposite case law to create an unprecedented exception to First Amendment guarantees. We decline to follow such a course, and hold that the Act lacks the elements that would make it analogous to the other restrictions on false speech previously held to be proscribable without constitutional problem. Accordingly, we hold that the Act is not narrowly drawn to achieve a compelling governmental interest, and is unconstitutional.

REVERSED. The case is REMANDED to the district court for proceedings consistent with this opinion.

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valid applications because Alvarez's prosecution is the first case brought under the Act in its current form. The second prosecution we know of, *United States v. Strandlof*, No. 09-cr-00497-REB, 2010 WL 2802691, ended in the defendant's favor, with the district court holding the Act unconstitutional for substantially the same reasons we do.

BYBEE, Circuit Judge, dissenting:

Xavier Alvarez, a California public official, stood in a public meeting and announced that he was a retired Marine, a wounded veteran, and the recipient of the Congressional Medal of Honor. Alvarez was lying on all counts. He pleaded guilty to violating the Stolen Valor Act of 2005 ("Act"), which punishes a person who "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." 18 U.S.C. § 704(b). He now challenges his conviction on First Amendment grounds.

In its recent decision in *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010), the Supreme Court reminded us that there are "categories of speech . . . fully outside the protection of the First Amendment." *Id.* at 1586. As to these categories—which the Court labeled "historic and traditional categories long familiar to the bar"—"the First Amendment has permitted restrictions upon the content of speech." *Id.* at 1584 (quotation marks omitted).

For more than six decades, the Court has recognized that "false statements of fact . . . belong to th[e] category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)). The Court has stated as plain as words permit that "the erroneous statement of fact is not worthy of constitutional protection." *Id.*;

see also BE & K Constr. Co. v. N.L.R.B., 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002) ("[F]alse statements [are] unprotected for their own sake."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas . . . . "); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (false statements of fact have "no constitutional value" because they "harm both the subject of the falsehood *and* the readers of the statement" (quotation marks omitted)); *Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech."); *Herbert v. Lando*, 441 U.S. 153, 171, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."). False statements are unprotected by the First Amendment except in a limited set of contexts where such protection is necessary "to protect speech that matters," *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997, such as "expression critical of the official conduct of public officials," *New York Times Co. v. Sullivan*, 376 U.S. 254, 268, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). And even in these special contexts, "the *knowingly* false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) (emphasis added).

Despite the clarity and consistency of the Supreme Court's insistence that false statements of fact (or "false statements") generally fall outside First Amendment protection, the majority somehow manages to "find *no*

authority holding that false factual speech, as a general category unto itself, is among [the historically unprotected classes of speech]," Maj. Op. at 1206 (emphasis added), and concludes that "we presumptively protect . . . false statements," *id.* at 1217. The majority then moves from this faulty principle to an even more remarkable one: after repeating the Court's statement in *Garrison* that "'the *knowingly* false statement . . . do[es] not enjoy constitutional protection,'" Maj. Op. at 1207 (alteration and ellipsis in original) (quoting *Garrison*, 379 U.S. at 75, 85 S. Ct. 209), the majority holds that Alvarez's *knowingly* false statement of fact is entitled to *full* constitutional protection, and therefore that the court is "required to apply the highest level of scrutiny in [its] analysis" of the Act, *id.* at 37; *see also id.* at 3 ("[R]egulations of false factual speech must . . . be subjected to strict scrutiny. . . ."). Standing on these startling premises, the majority delivers its final blow: the Act fails strict scrutiny and is thus unconstitutional not only as applied to Alvarez, but in all its applications. *See id.* at 45-46.

I would hold that the Act is constitutional as applied to Alvarez and that the Act is not unconstitutionally overbroad. Because the majority has rewritten established First Amendment law, I respectfully dissent.

I

Before turning to Alvarez's as-applied and facial challenges and the majority's errors with respect to the particular elements of this case, I am going to begin by discussing the First Amendment framework under which the Supreme Court analyzes false statements of fact, which involves a general rule and a series of exceptions. I then explain why I think the majority has mis-

read the cases and, in the process, turned the exceptions into the rule and the rule into an exception.

A

The First Amendment states, in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I. "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (alteration and quotation marks omitted) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002)). A content-based restriction of constitutionally protected speech "can stand only if it satisfies strict scrutiny," *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), meaning that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

But not all speech is entitled to First Amendment protection. Rather, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem" because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). Included among these "classes of speech" are "obscenity, defamation, fraud,

incitement, and speech integral to criminal conduct." *Stevens*, 130 S. Ct. at 1584 (citations omitted); *see also Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766.

"Defamation" as a class of speech falls within the unprotected category of speech that the Court has referred to as "false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). In *Gertz*, the Court explained the difference between false statements of fact and false ideas: "Under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact." *Id.* at 339-40, 94 S. Ct. 2997. It then held that "the erroneous statement of fact is not worthy of constitutional protection." *Id.* at 340, 94 S. Ct. 2997. The Supreme Court has regularly repeated, both inside and outside of the defamation context, that false statements of fact are valueless and generally not within the protection of the First Amendment. *See, e.g., BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002) ("[F]alse statements [are] unprotected for their own sake."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas. . . ."); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (false statements of fact have "no constitutional value" because they "harm both the subject of the falsehood *and* the readers of the statement" (quotation marks omitted)); *Bill Johnson's Rest., Inc. v. N.L.R.B.*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech."); *Herbert v. Lando*, 441 U.S. 153, 171, 99 S. Ct. 1635, 60

L. Ed. 2d 115 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 499 n.3, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) (Powell, J., concurring) ("[T]he First Amendment affords no constitutional protection for false statements of fact."). Because false statements of fact do not enjoy the protection of the First Amendment, such statements may ordinarily be regulated by the government. Congress, for example, has provided criminal penalties for any number of false statements of fact uttered in a variety of contexts. *See, e.g.*, 18 U.S.C. pt. I, ch. 47 *passim* ("Fraud and false statements").

Thus, the general rule is that false statements of fact are not protected by the First Amendment.[1] There is,

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[1] The majority disagrees with my characterization of *Gertz*'s principle as a "general rule" and of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and its progeny as "exceptions." The majority argues that "[t]he fundamental rule is found in the First Amendment itself: 'Congress shall make no law . . . abridging the freedom of speech.'" Maj. Op. at 1205 (ellipsis in original) (quoting U.S. CONST. amend. I). Thus, the majority continues, "[a]ny rule that certain speech is not protected by this foundational principle is the exception, which may in turn be subject to other exceptions to protect against such exceptions swallowing the rule." *Id.*

The majority has misunderstood the concept of unprotected speech. It is not true, as the majority states, that "we presumptively protect all speech against government interference." *Id.* The First Amendment does not protect all "speech" but rather "the freedom of speech," which *does not include* those categories of speech traditionally considered outside of First Amendment protection. *See* John Paul Stevens, *The Freedom of Speech*, 102 YALE L. J. 1293, 1296 (1993) ("I emphasize the word 'the' as used in the term 'the freedom of speech' because the definite article suggests that the draftsmen intended to immunize a *previously identified category or subset of speech*. That category could

however, an important exception to this principle: where protecting a false statement is necessary "in order to protect speech that matters." *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997; *see also BE & K*, 536 U.S. at 531, 122 S. Ct. 2390 ("[W]hile false statements may be unprotected for their own sake, '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.'" (emphasis omitted) (second alteration in original) (quoting *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997)). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the seminal case in this area, the Court extended limited First Amendment protection to libelous statements "critical of the official conduct of public officials." *Id.* at 268, 84 S. Ct. 710. Because "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive,'" the Court feared that permitting public officials to bring tort claims against their critics based on a false statement of fact would "lead[ ] to . . . 'self-censorship,'" deterring such critics "from voicing their criticism[ ] even though it is believed to be true and even though it is in fact true." *Id.* at 271-72, 279, 84 S. Ct. 710 (ellipsis omitted). In order to protect against such "self-censorship," the Court adopted "a federal rule

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not have been coextensive with the category of oral communications that are commonly described as 'speech' in ordinary usage. . . . The Amendment has never been understood to protect all oral communication." (emphasis added)). Thus, the lack of protection afforded false statements of fact is no more of an "exception" to the First Amendment than the lack of First Amendment protection afforded the pulling of a gun trigger. Neither of these activities is considered *part of* "the freedom of speech," so neither should be characterized as an *exception* to the First Amendment.

that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80, 84 S. Ct. 710. The Court has extended the *New York Times* "actual malice" rule to "public figures" even if they are not "public officials," *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), but has "refus[ed] to extend the *New York Times* privilege to defamation of private individuals," even with respect to matters of public concern, *Gertz*, 418 U.S. at 351, 94 S. Ct. 2997.[2]

Consistent with the principle set forth in *New York Times*, the Court held, in *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), that "the *knowingly* false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Id.* at 75, 85 S. Ct. 209 (emphasis added); *see also id.* ("Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas. . . .'" (quoting *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766)). In *Gertz*, the Court confirmed that knowing lies are excluded from the limited First Amendment protection *New York Times* established for false statements of fact: "[T]he intentional lie . . . [does not] materially advance[ ] society's interest in 'uninhibited, robust, and wide-open' debate on public

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[2] Although the Court in *Gertz* "allow[ed] the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*," the Court held that damages are limited to "compensation for actual injury." *Gertz*, 418 U.S. at 348-49, 94 S. Ct. 2997.

issues." *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997 (quoting *New York Times*, 376 U.S. at 270, 84 S. Ct. 710). Although *Garrison* and *Gertz* both involved defamation, the Supreme Court and our court have extended *Garrison*'s rule beyond the defamation context, as will be discussed in Part I.B.2.

There is, however, an important caveat to the principle that knowingly false statements of fact are not entitled to constitutional protection. *See* Maj. Op. at 1213-14. The Court has recognized that some statements that, literally read, are technically "knowingly false" may be "no more than rhetorical hyperbole," *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970), or "lusty and imaginative expression," *Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 286, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), such as satire or fiction. In *Hustler*, the Supreme Court held that the First Amendment protects defamatory statements about a public figure "that could not reasonably have been interpreted as stating actual facts about the public figure involved." 485 U.S. at 50, 108 S. Ct. 876. And in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), the Court clarified that such protection "provides assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation." *Id.* at 20, 110 S. Ct. 2695 (quotation marks omitted); *see also Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005) (stating that "[t]he First Amendment protects statements that cannot reasonably [be] interpreted as stating actual facts about an individual" because of "the reality that exaggeration and nonliteral commentary have become an integral part of so-

cial discourse" (quotation marks omitted) (second alteration in original)). In a sense, the Court has established that "lies" made in the context of satire and imaginative expression are not really lies at all and perhaps not really even statements of "fact," because no reasonable listener could actually believe them to be stating actual facts.

In sum, the Supreme Court's jurisprudence on false statements of fact involves a general rule with certain exceptions and exceptions-to-exceptions. In general, "there is no constitutional value in false statements of fact," and so "the erroneous statement of fact is not worthy of constitutional protection." *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997. However, this general principle is subject to certain limited exceptions where First Amendment protection is necessary "to protect speech that matters," *id.* at 341, 94 S. Ct. 2997, and to ensure that the "freedoms of expression . . . have the 'breathing space' that they 'need to survive,'" *New York Times*, 376 U.S. at 271-72, 84 S. Ct. 710 (alteration omitted). Accordingly, a defamatory false statement of fact made about a public figure is constitutionally protected if it is made without "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280, 84 S. Ct. 710. On the other hand, "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison*, 379 U.S. at 75, 85 S. Ct. 209. The only qualifier to this rule is that statements that are technically "knowingly false" receive constitutional protection when they "c[an]not reasonably have been interpreted as stating actual facts." *Hustler*, 485 U.S. at 50, 108 S. Ct. 876.

B

Notwithstanding the Court's pronouncements on the unprotected status of false statements of fact, the majority "find[s] no authority holding that false factual speech, as a general category unto itself, is among [the historically unprotected classes of speech]," Maj. Op. at 1206, and concludes that "we presumptively protect . . . false statements," *id.* at 1217. The majority believes that, when the Supreme Court has said that "false statements of fact" are unprotected by the First Amendment, what the Court actually meant was that *defamation* is unprotected by the First Amendment. *See id.* at 1208 ("[W]e believe the historical category of unprotected speech identified in *Gertz* and related law is defamation, not all factual speech."). From this premise, and after refusing to "extend" the unprotected category of speech (defamation) to false statements generally, *id.* at 1208, the majority suggests that false statements of fact are generally entitled to *full* constitutional protection, even if they are *knowingly* false, unless they are defamatory, fraudulent, or integral to criminal conduct, *see id.* at 1211-13.

The majority has effectively overruled *Gertz* and inverted the whole scheme. The Supreme Court has told us consistently that the general rule is that false statements of fact are unprotected, and has carved out certain limited exceptions to this principle in certain contexts. The majority flips this framework around and suggests that false statements of fact are generally unprotected *only* in contexts like defamation and fraud, and that outside these contexts they are fully protected. *See id.* at 1213 ("[T]he historical and traditional categories of unprotected false factual speech have thus far

included only certain *subsets* of false factual statements. . . ."); *id.* at 1213 (finding that only "certain subsets of false factual speech have been declared unprotected," and that "[t]he Act does not fit neatly into any of those . . . classes"). In other words, the majority limits the general rule to its exceptions. In my view, the majority is wrong for a number of reasons.

1

As a general matter, the majority's principle rests on a line of reasoning that I cannot endorse: that our jurisprudence should rest on what we think the Supreme Court "means" rather than what it actually says, and thus, because the Supreme Court means "defamation" when it says "false statements of fact," only the former represents an unprotected category of speech. The majority even considers it "erroneous[ ]" for me to "rel[y] on *Gertz* for its statement that false factual speech is valueless and unprotected." *Id.* at 1203.

With all due respect, I believe that reliance on *Gertz*'s statement (and the Court's numerous other statements to the same effect) is not only far from "erroneous[ ]" but *obligatory*. We do not have the authority as a lower court to limit the Court's statements to what we believe they mean rather than what they actually say. *Gertz* could have used the terms "defamation" or "libel" rather than "false statements of fact" to describe the unprotected category of speech—it presumably knew what these terms mean—but it did not. Because the Court has told us unambiguously that "false statements of fact" are generally unprotected by the First Amendment, this principle should be the starting point

for our analysis, not the point for the majority's departure from the principle.[3]

2

Even if we had the authority to limit the Supreme Court's statements to what we think they mean rather than what they actually say, the Supreme Court *did* (and does) mean that "false statements of fact" are *generally* unprotected and that (non-satirical and non-theatrical) knowingly false statements of fact are *always* unprotected. Supreme Court precedent, Ninth Circuit precedent, and logic compel this conclusion.

The Supreme Court has used the same framework for analyzing false statements of fact in cases involving *neither* defamation *nor* fraud as it did in *New York Times*, *Garrison*, and *Gertz*; these cases demonstrate that the Court's statements regarding the general unprotected nature of "false statements of fact" and its even more conclusive statements regarding *knowingly* false statements of fact apply to cases outside the defamation/fraud context. In these cases involving neither defamation nor fraud, the Court began with the premise that false statements of fact are unprotected, and its entire analysis was directed toward deciding whether the application of *New York Times*'s "actual malice"

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[3] The majority's reliance on Justice Stevens's opinion in *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S. Ct. 2554, 156 L. Ed. 2d 580 (2003), *see* Maj. Op. at 1202-03, gives away its true intentions. In that case, Justice Stevens concurred in the Court's *dismissal of the grant of certiorari* and, in a parenthetical, suggested that *Gertz*'s statement that there is no constitutional value in false statements of fact was "(perhaps overbroad [ ])." *Id.* at 664, 123 S. Ct. 2554. Justice Stevens stopped far short of suggesting that *Gertz* should be overruled, but that is the implication the majority takes away.

standard was necessary in that case to protect speech that matters. Although the Court at times decided that the non-defamation case before it *was* such a case where *New York Times*'s "actual standard" was necessary, it was careful to emphasize, consistent with *Garrison*, that false statements made *with* actual malice fall outside of First Amendment protection. In other words, the only reason that there was even a need for discussion was because the statement in question was arguably made *without* "actual malice"; if the statement in question had been clearly uttered with actual malice, the statement would be unprotected irrespective of whether *New York Times* applied.

In *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967), for example, the Court held that an award of damages under New York's "right of privacy" law based on "allegations that [defendant] falsely reported that a new play portrayed an experience suffered by [plaintiff]," *id.* at 376-77, 87 S. Ct. 534, could not be sustained without "proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth," *id.* at 388, 87 S. Ct. 534. After careful analysis, rather than "through blind application of *New York Times*," *id.* at 390, 87 S. Ct. 534, the Court concluded that "sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising constitutional guarantees," *id.* at 389, 87 S. Ct. 534. At the same time, the Court was careful to stress, relying on *Garrison*, that "'[t]he use of *calculated* falsehood . . . would put a different cast on the constitutional question.'" *Id.* at 390, 87 S. Ct. 534 (emphasis added) (quoting *Garrison*, 379 U.S. at 75, 85 S. Ct. 209). The Court declared that "the constitutional guarantees can tolerate sanctions

against calculated falsehood without significant impairment of their essential function." *Id.* at 389, 85 S. Ct. 209; *see also id.* at 390, 85 S. Ct. 209 ("What we said in *Garrison* . . . is *equally applicable* [here]." (emphasis added)).

And in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), the Court applied the *New York Times* framework to a case involving a teacher who claimed that his First Amendment rights were violated when he was terminated for sending to a local newspaper a letter containing false statements of fact critical of the district superintendent. *See id.* at 572-74, 88 S. Ct. 1731. As in *Time*, the Court in *Pickering* started from the premise that false statements of fact are unprotected, and the only question was whether the context it was dealing with was similar enough to defamation to merit the application of *New York Times*'s "actual malice" rule. *See id.* at 574, 88 S. Ct. 1731. The Court concluded that the potential for self-censorship was sufficient to warrant *New York Times*'s "actual malice" requirement, but made clear that the extent of constitutional protection was limited: "[I]n a case such as this, *absent* proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* (emphasis added) (footnote omitted).[4]

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[4] Although *BE & K* and *Bill Johnson*'s did not involve the freedom of speech *per se* but rather the First Amendment right to petition, these decisions are further examples of the Court's reliance on *Gertz*'s principle outside of the defamation context. *See BE & K*, 536 U.S. at 531, 122 S. Ct. 2390 ("[F]alse statements [are] unprotected for their own sake. . . ." (citing *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997)); *Bill Johnson's*, 461 U.S. at 743, 103 S. Ct. 2161 ("Just as false statements are not

Nothing in the Court's recent decision in *Stevens* is to the contrary. The majority believes that, "[s]ince the *Stevens* Court saw fit to name defamation specifically, rather than false statements of fact generally, as the historical category excluded from constitutional protection, . . . the historical category of unprotected speech identified in *Gertz* and related law is defamation, not all factual speech." Maj. Op. at 1223. But *Stevens*'s use of the word "defamation" is nothing new. As far back as *Chaplinsky*, the Court has frequently used the words "defamation" and "libel" to describe one of the categories of unprotected speech. *See* 315 U.S. at 572, 62 S. Ct. 766 (including among the unprotected "classes of speech" "the lewd and obscene, the profane, the *libelous*, and the insulting or 'fighting' words" (emphasis added)). Then, in *Gertz*, the Court used the broader term "false statements of fact" to describe this category. 418 U.S. at 340, 94 S. Ct. 2997; *see also BE & K*, 536 U.S. at 531, 122 S. Ct. 2390; *Hustler*, 485 U.S. at 52, 108 S. Ct. 876. Because most of the Court's opinions in this historically unprotected category have dealt with defamation, and because the Court has used both the terms "defamation" and "false statements of fact" to describe speech within the unprotected category, there is nothing interesting about *Stevens*'s use of the term "defamation." If *Stevens* truly stands for the proposition that only defamatory statements—and not false statements of fact generally—constitute the unprotected category, then *Stevens* overruled *sub silentio* every Supreme Court case using the general term "false statements of fact" *and* every case applying the *New York Times-Gertz-Garrison*

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immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." (citations omitted) (citing *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997)).

framework outside of the defamation context. I find this hard to believe.

Similar considerations demonstrate why the majority is misguided in relying upon *Stevens*'s statement that "'[o]ur decisions [following *Chaplinsky*] cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.'" Maj. Op. at 1209 (second alteration in original) (quoting *Stevens*, 130 S. Ct. at 1586); *see also id.* at 1207-08 ("Unlike our dissenting colleague, we are not eager to extend a statement (often quoted, but often qualified) made in the complicated area of defamation jurisprudence into a new context. . . . "). *Stevens* involved the potential creation of a truly "new" category of unprotected speech: "depictions of animal cruelty." 130 S. Ct. at 1584. This case, in contrast, involves a *pre-existing* category of unprotected speech: false statements of fact. Thus, no "expansion" of First Amendment jurisprudence is necessary to hold that Alvarez's false statements are not protected.

Our own cases are in accord with the principle that false statements of fact (not just defamatory or fraudulent false statements) are generally unprotected by the First Amendment, although we have recognized that "constitutional protection is afforded *some* false statements." *Johnson v. Multnomah County*, 48 F.3d 420 (9th Cir. 1995) (emphasis added). We have often applied the *New York Times-Garrison-Gertz* framework outside of the defamation and fraud context.

In *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), for example, we held that "[t]here is no first amendment protection for furnishing with predatory intent false informa-

tion to an administrative or adjudicatory body," and thus the First Amendment did not shield the defendants from *antitrust* liability. *Id.* at 1261; *see also id.* ("The first amendment has not been interpreted to preclude liability for false statements. . . . '[T]here is no constitutional value in false statements of fact.'" (quoting *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997)). We "recogniz[ed] that under certain circumstances allowing the imposition of liability for statements can hamper debate, *see New York Times*," which "*may* suggest that a court should adopt a stricter standard of proof," but we determined that defendants' statements were unprotected regardless of the correct standard of proof because "defendants *knew* the falsity of their statements." *Id.* at 1262 (emphases added). In other words, the defendants' knowledge of the falsity of their statements placed the defendants' statements clearly outside of the First Amendment. Thus, unlike in *Time* and *Pickering*, there was no need for any further discussion of whether the *New York Times* "actual malice" requirement applied. *See id.*

More recently, in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), we applied the *New York Times* framework to a case in which the plaintiff claimed that his common law right of publicity had been violated by the defendant's publication of an altered photograph of the plaintiff's name and likeness, *see id.* at 1183, which "create[d] a false impression in the minds of the public that they were seeing [the plaintiff's] body," *id.* at 1186 (quotation marks omitted). Regarding the defendant's First Amendment defense, we determined that the question was whether the district court correctly held that the First Amendment did not protect the defendant's publication because the defendant "pub-

lished that image *knowing* it was false and intending that the readers believe the falsehood." *Id.* (emphasis added). Although we eventually concluded that the district court erred in finding that "actual malice" existed, *id.* at 1189, the important point is that a finding of knowledge as to falsity would have meant that the defendant's publication was not protected by the First Amendment, irrespective of the fact that the purported falsehood was not defamatory or fraudulent.[5]

Under the majority's view, the Supreme Court's decisions in *Time* and *Pickering*, and our decisions in *Clipper Exxpress* and *Hoffman*, are all disapproved, if not overruled. But even putting aside these precedents, I do not believe that the majority's principle is logical. Given that the Court has clearly recognized defamation as one of the exceptional situations where protecting certain false statements is necessary to "protect speech that matters," *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997, I cannot see how *Gertz* could have meant "defamation" when it said that "false statements of fact" are unprotected. If that were true, there would be nothing left of *Gertz*'s statement that false statements of fact fall outside of First Amendment protection. In other words, the majority interprets *Gertz* the following way: defamation is unprotected by the First Amendment, but it is necessary to protect defamation in order to protect speech that

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[5] The majority is "not persuaded that *Hoffman* . . . is anything more than a variation on defamation jurisprudence." Maj. Op. at 1208-09 n.10. But although the false statements in *Hoffman* were arguably more like defamation than the false statements in Alvarez's case, *Hoffman* and similar cases nevertheless demonstrate that "false statements of fact" means "*false statements of fact*," not simply "defamation," and that the former represents the historically unprotected category of speech, not the latter.

matters. Under the majority's logic, *Gertz* is internally inconsistent, and the exception has swallowed up the rule.

3

Although I believe that it is clear that the Supreme Court's statements regarding false statements of fact extend outside of the defamation and fraud context, I nevertheless find it necessary to respond to the majority's misguided "bona fide harm" theory. The majority asserts that the Supreme Court has extended the *New York Times-Garrison-Gertz* framework only to false statements "likely to cause a bona fide harm," such as those that constitute fraud. Maj. Op. at 1211. In other words, the majority suggests that a false statement loses First Amendment protection only if it is likely to cause a cognizable—indeed, "irreparable"—harm. *Id.* at 1207. Based on this premise, the majority might assert that the Court applied the *New York Times-Garrison-Gertz* framework in *Time*, *Pickering*, *Clipper Exxpress*, and *Hoffman* because the false statements in those cases were likely to cause a cognizable harm, but the false statements punished by the Stolen Valor Act are fully protected because these statements do not generally produce what the majority considers to be a "bona fide harm." *See id.* at 1212 n.12. I respectfully disagree.

a

The likelihood of a "bona fide harm" has nothing to do with whether a category of speech loses First Amendment protection. *Stevens* rejected the notion that the First Amendment protection afforded a class of speech depends on a consideration of the "societal costs" of the class of speech. 130 S. Ct. at 1585. Rather, whether a

category of speech is constitutionally protected is a *historical* question that depends on whether a class of speech has traditionally been thought to be of low First Amendment *value*. As the Supreme Court reiterated in *Stevens*:

> From 1791 to the present, . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these *traditional* limitations. These *historic* and *traditional* categories long familiar to the bar . . . are well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.

Id. at 1584 (emphases added) (quotation marks and citations omitted) (alteration in original); *see also id.* at 1586 (noting that the Court's First Amendment cases regarding speech outside First Amendment protection have "grounded[their] analysis in a *previously recognized, long-established* category of unprotected speech" (emphasis added)); *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (describing unprotected classes of speech as "utterances [that] are *no essential part of any exposition ideas*, and are of such *slight social value* as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (emphases added)). Once again, decades of Supreme Court case law make clear that false statements of fact are one of those classes of speech that are generally considered to be of low First Amendment value and therefore have traditionally fallen outside First Amendment protection.

I agree with the majority that the Court's statements in this regard cannot be interpreted as "absolute proposition[s]," Maj. Op. at 1202-03, because the Court has established that, although "false statements may be unprotected for their own sake," *BE&K*, 536 U.S. at 531, 122 S. Ct. 2390, the Constitution "requires that we protect *some* falsehood in order to protect speech that matters," *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997 (emphasis added). But the protection the Court has afforded for "*some* falsehood" has been limited to narrow subsets within the historically unprotected category—*certain* false statements of fact critical of public figures if made without "knowledge that [they are] false or with reckless disregard of whether [they are] false or not," *New York Times*, 376 U.S. at 280, 84 S. Ct. 710; *certain* false statements of fact in contexts similar to defamation, such as intrusions on a public figure's privacy, *see Time*, 385 U.S. at 376-77, 388, 87 S. Ct. 534, and criticisms of one's superior, *see Pickering*, 391 U.S. at 572-74, 88 S. Ct. 1731; and *certain* false statements of fact that "c[annot] reasonably have been interpreted as stating actual facts," *Hustler*, 485 U.S. at 50, 108 S. Ct. 876. The fact that the Supreme Court has extended limited constitutional protection to some false statements of fact in defamation and defamation-like cases and that these cases generally involve a cognizable harm to a particular party does not demonstrate that a cognizable harm is a *prerequisite* before a false statement of fact loses its First Amendment protection. Rather, the spheres of protection carved out in *New York Times*, *Hustler*, and like cases represent limited *exceptions* to the general rule that false statements of fact are *not protected* by the First Amendment, irrespective of a cognizable harm to a specific person. *See Keeton*, 465 U.S. at 776, 104 S. Ct.

1473 (false statements of fact have "no constitutional value" because they "harm *both* the subject of the falsehood *and* the readers of the statement" (first emphasis added) (quotation marks omitted)). If a false statement of fact does not fall within one of these exceptions, it falls within the general historically unprotected category of speech, and the absence of "harm" is irrelevant.

b

The Court's obscenity jurisprudence is an embarrassment to the majority's newly-minted "harm" requirement. The Court has long held that obscene speech is not protected by the First Amendment, *see Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766, because it is "utterly without redeeming social importance," *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), and not because the states have satisfied some "proof of harm" requirement. In *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), the Supreme Court defined works that are "obscene" and therefore fall outside the protection of the First Amendment, and "bona fide harm" is notably absent as a requirement under its definition. The Court stated:

> [W]e now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24, 93 S. Ct. 2607 (footnote omitted).

We might say, of course, that obscenity is *generally* harmful, or that obscenity has traditionally been *thought* to be harmful given that obscenity regulations represent a legislative determination that obscene materials generally degrade our morals or endanger public safety. But the majority holds the Stolen Valor Act unconstitutional because it does not require *proof* that any particular statement causes harm. While acknowledging Congress's finding that false claims like Alvarez's "damage the reputation and meaning of [military] decorations and medals," Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266 (2005) (the "Findings"); Maj. Op. at 1209-10, the majority emphasizes that the Findings "do not actually limit the *application* of the Act" because "[t]here is no requirement in the Act that the government bear the burden to *prove* that the defendant's speech or writing proximately caused damage to the reputation and meaning of military decorations and medals," Maj. Op. at 1210 (second emphasis added).[6]

The problem is that this is true of obscenity regulations as well; although obscenity laws are generally targeted at some cognizable harm, they do not explicitly require that the government even *identify*, much less *prove*, a cognizable harm in every case. Indeed, it was of no concern to the Court that "there [wa]s no conclusive proof of a connection between antisocial behavior and obscene material," because "[n]othing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there [wa]s no conclusive evidence or empirical data." *Paris Adult*

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[6] I return to this point in Part II.C.

Theatre I v. Slaton, 413 U.S. 49, 60-61, 63, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973). Thus, the Court's obscenity jurisprudence demonstrates that a "harm" requirement simply does not exist in terms of the protection afforded a category of speech.

c

The majority places great weight on the Court's decision in *Schenck v. United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919), in which the Court famously held that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52, 39 S. Ct. 247. The majority even suggests that the "clear and present danger" rule is the test "for defining the relevant subset of false speech that is historically unprotected." Maj. Op. at 1214; *see also id.* at 1215 ("Following *Schenck*, . . . we might articulate the class of false factual speech unprotected by the First Amendment to be that false factual speech which creates a clear and present danger of a harm Congress has a right to prevent.").

The majority is wrong. The Court has never used the "clear and present danger" test to determine whether a category of speech is protected in the first instance. Much to the contrary, the Court has specifically held that the existence of a "clear and present danger" of harm is irrelevant in the context of unprotected categories of speech. In *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952), the Court stated:

> Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, ei-

> ther for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.

Id. at 266, 72 S. Ct. 725.

Schenck dealt with a content-based restriction of a category of speech that would now be considered *clearly* entitled to First Amendment protection—indeed, there are few categories of speech *more* valuable in terms of First Amendment principles than opinions critical of the government on matters of national security, such as military conscription. *See Schenck*, 249 U.S. at 51, 39 S. Ct. 247; *see also Brandenburg v. Ohio*, 395 U.S. 444, 448-49, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 39 (1992) (providing "seditious advocacy" as an example of "constitutionally *protected* speech" (emphasis added)). *Schenck* and cases like it did not consider whether a category of speech is *protected* by the First Amendment—again, that question depends on whether the speech has historically been considered of low First Amendment value. Rather, the question in those cases was whether the government's interest in preventing lawless action—that is, in preventing the harm potentially produced by *protected* speech—was sufficient to *overcome* the First Amendment interests in a particular context, *see* Kagan, 1992 SUP. CT. REV. at 39 ("In deciding [a case involving seditious advocacy,] . . . the Court will ask . . . whether the government has a sufficient rea-

son to restrict the speech actually affected."), which depended on whether the speech at issue "create[d] a clear and present danger," *Schenck*, 249 U.S. at 52, 39 S. Ct. 247.

d

Finally, the majority's reliance on statutes criminalizing fraud and similar crimes, *see* Maj. Op. at 1211-13, is both flawed and puzzling. Although fraud statutes generally require that the fraudulent statement cause an injury, and although the Supreme Court has held that fraudulent statements are not entitled to First Amendment protection, *see, e.g., Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003), it stretches logic to conclude from these holdings that a cognizable injury is *necessary* for a category of speech to fall outside First Amendment protection. That is, just because fraud statutes may require some proof of harm, and such statutes have been held constitutional, does not mean that in order for a statute such as the Stolen Valor Act to be constitutional, it too must require proof of harm.[7] To so hold is a formal error in logic. The notion that a regula-

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[7] Numerous statutes are called into question by the majority's opinion. The following are just some of the statutes that punish false statements and do not appear to require proof of harm (including that the false statement be "material"): 18 U.S.C. § 1011 (punishing "any false statement . . . relating to the sale of any mortgage, to any Federal land bank"); 18 U.S.C. § 1015(a) (punishing "any false statement under oath, in any case, proceeding, or matter relating to . . . naturalization, citizenship, or registry of aliens"); 18 U.S.C. § 1026 (punishing "any false statement for the purpose of influencing in any way the action of the Secretary of Agriculture . . . in connection with . . . farm indebtedness"); 18 U.S.C. § 1027 (punishing "any false statement" made "in any document required by [ERISA]").

tion of unprotected speech requires individualized proof of a cognizable harm is inconsistent with the Supreme Court's First Amendment jurisprudence.

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In sum, the better interpretation of the Supreme Court's cases and those of our court is that false statements of fact—as a general category—fall outside of First Amendment protection except in certain contexts where such protection is necessary "to protect speech that matters." If a false statement does not fall within one of these exceptions, the general rule applies. And even in the exceptional contexts, a false statement that is neither satirical nor theatrical is unprotected if it is made with knowledge or reckless disregard of falsity.

II

With these principles in mind, I now turn to Alvarez's as-applied challenge.

A

In a public meeting, Alvarez stated: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around." Alvarez does not deny that his statement that he received the Congressional Medal of Honor was a statement of fact, that this statement was false, and that he made the statement with full knowledge of the statement's falsity. He does not attempt to defend his actions as hyperbole or imaginative expression, nor does he claim that he was misunderstood in context. Alvarez also knew when he uttered the statement that his claim to have been a Marine was false, that he had not served

in any branch of the armed forces for twenty-five years, and that no one had shot and wounded him while he was in the service of his country.

All things considered, Alvarez's self-introduction was neither a slip of the tongue nor a theatrical performance; it was simply a lie. Under the rules announced in *Garrison* and its progeny, Alvarez's knowingly false statement is *excluded*[8] from the limited spheres of protection carved out by the Supreme Court for false statements of fact necessary to protect speech that matters, and it is therefore not entitled to constitutional protection. *See Garrison*, 379 U.S. at 75, 85 S. Ct. 209 ("[T]he knowingly false statement . . . do[es] not enjoy constitutional protection."); *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997 ("[T]he intentional lie . . . [does not] materially advance [ ] society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (quoting *New York Times*, 376 U.S. at 270, 84 S. Ct. 710)); *Time*, 385 U.S. at 389, 87 S. Ct. 534 ("[T]he constitutional guarantees can tolerate sanctions against calculated falsehood without

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[8] I emphasize the fact that the Supreme Court has *affirmatively excluded* knowingly false statements from First Amendment protection rather than simply *failed to include* them. The majority argues that, "even if one agrees with the dissent that *Gertz* and its progeny require[ ] the historical category of unprotected speech at issue here [to] be defined as knowingly false factual speech per se, that is simply not enough to make the [Stolen Valor] Act immune from First Amendment analysis," and that we would need to "guess what rule the Court would adopt for [knowingly false statements]." Maj. Op. at 1208 n.9. The majority seems to suggest that the Supreme Court has not yet decided what degree of constitutional protection will be afforded knowingly false statements of fact. For the reasons I have explained above, I think the matter is quite to the contrary.

significant impairment of their essential function.").[9] Thus, there is no need to apply strict scrutiny.[10]

B

The Supreme Court's clear rules are sufficient to doom Alvarez's as-applied challenge,[11] but even apart

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[9] The majority is "concern[ed] . . . because of [the Act's] potential for setting a precedent whereby the government may proscribe speech solely because it is a lie." Maj. Op. at 1200. The majority fears that, under my interpretation, the government could "criminaliz[e] lying about one's height, weight, age, or financial status on match.com or facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway." Maj. Op. at 1200. Alvarez provides a similar parade of horribles, arguing that Congress could prohibit lying to one's children about the existence of Santa Claus.

But the fact that we might find the majority's and Alvarez's hypothetical laws troubling from a policy perspective is irrelevant to the First Amendment question. *Garrison*, *Gertz*, and *Time* could not have been clearer: knowing lies are unprotected by the First Amendment. Until the Supreme Court tells us otherwise, the proper target for the majority's concerns is the legislature, not this court.

[10] I agree with the majority that *if* the Stolen Valor Act were subjected to strict scrutiny, the Act would not satisfy this test. *See* Maj. Op. at 1215-17. I simply do not agree that the Act *should* be subjected to strict scrutiny.

[11] The majority points out that, if I am correct, "the opinion in this case would need be no more than a few paragraphs in length," and asserts that "the First Amendment requires more." Maj. Op. at 1208 n.9. The majority is correct that, in the Supreme Court's cases involving false statements of fact, "the First Amendment analysis [wa]s . . . rigorous," *id.*, in spite of the general unprotected nature of false statements of fact. But as discussed above, this "rigor" was necessary only to determine whether the Court was faced with one of the unique situations where New York Times's "actual malice" standard was *necessary* in order to protect speech that matters. *See, e.g.*, *Pickering*, 391 U.S. at 574, 88 S. Ct. 1731; *Time*, 385 U.S. at 389-90, 87 S. Ct. 534; *New*

from these rules, none of the concerns that animated *New York Times* and its progeny should shield Alvarez's statement. *New York Times* imposed an "actual malice" requirement on defamation suits brought by public figures trying to suppress *criticism* of them as public figures. *See* 376 U.S. at 282, 84 S. Ct. 710 ("We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against *critics of their official conduct.*" (emphasis added)); *Gertz*, 418 U.S. at 334, 94 S. Ct. 2997 (discussing "a constitutional privilege intended to free *criticism of public officials* from the restraints imposed by the common law of defamation" (emphasis added)). In particular, the *New York Times* Court found that the "actual malice" standard was necessary to prevent defamation from being used by public officials as a civil substitute for criminal sedition: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel" because "damage awards . . . may be markedly more inhibiting than the fear of prosecution." 376 U.S. at 277, 84 S. Ct. 710 (footnote omitted). The Court was determined not to let public officials suppress or chill criticism of their official actions by threat of a lawsuit. And the Court was confident that public officials, because of their public position, would "have a . . . realistic opportunity to counteract false statements" due to their "significant[ ] . . . access to the channels of effective communication." *Gertz*, 418 U.S. at 344, 94 S. Ct. 2997.

York Times, 376 U.S. at 271-72, 84 S. Ct. 710. Here, there is no need to consider whether *New York Times*'s standard applies because Alvarez indisputably *did* act with "actual malice."

The principles in *New York Times* do not extend to false self-promotion. Nor do these principles extend to false self-promotion by public officials—that is, to officials who portray themselves in a false but positive light. Public discourse requires that citizens are equally free to praise or to condemn their government and its officials, but I can see no value in false, self-aggrandizing statements by public servants. Indeed, the harm from public officials outright lying to the public on matters of public record should be obvious. If the Stolen Valor Act "chills" false autobiographical claims by public officials such as Alvarez, our public discourse will not be the worse for the loss.

C

The majority provides two main reasons for why the Act is unconstitutional as applied to Alvarez. First, the majority reasons that the Act is unconstitutional because it "does not require a malicious violation, nor does it contain any other requirement or element of scienter. . . . Without a scienter requirement to limit the Act's application, the statute raises serious constitutional concerns . . . because the First Amendment clearly prohibits criminally punishing negligent speech about matters of public concern." Maj. Op. at 1209 (citing *Gertz*, 418 U.S. at 340, 347, 94 S. Ct. 2997).

For one thing, *Gertz* does not stand for this proposition; in *Gertz*, the Supreme Court "*refus[ed]* to extend the *New York Times* privilege to defamation of private individuals," even though the subject matter was a matter of public concern. *Gertz*, 418 U.S. at 350, 94 S. Ct. 2997 (emphasis added). But even accepting that false statements of fact made about *oneself* can be punished only if they are made with "actual malice" (a principle

that is not clearly true), this requirement is irrelevant to Alvarez's as-applied challenge because there is no dispute that Alvarez *did* make his false statement with "actual malice"—that is, knowingly.[12] If anything, the lack of a malice requirement is relevant only to Alvarez's facial challenge, which I will discuss in Part III.[13]

Second, the majority holds that the Act is unconstitutional because it does not require that the false statement proximately cause an "*irreparable*" harm. Maj. Op. at 1207. As discussed above, the First Amendment contains no such requirement, *see* Part I.B.3, *supra*, and thus the Act's failure to require harm is irrelevant to the determination of whether it is unconstitutional.

But even if the First Amendment demanded some proof of harm, the majority has supplied no reason to question Congress's determination that "[f]raudulent claims surrounding the receipt of . . . [military] decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266 (2006). When George Washington created the Badge of Military Merit, the predecessor to the Purple Heart, he wished to honor those who performed "singularly meritorious action" with "the figure of a heart in purple cloth." Those who demonstrated "unusual gallantry, . . . extraordinary fidelity, and essential service

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[12] Unlike the government, I do not propose that a scienter requirement be read into the Act.

[13] Indeed, because the majority does not hold that the Stolen Valor Act is unconstitutionally overbroad, it is unclear what relevance the Act's lack of a scienter requirement has even to the majority's holding with respect to Alvarez's facial challenge.

in any way, [would] meet with a due reward." At the same time, he ordered that, "[s]hould any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished." GENERAL ORDERS OF GEORGE WASHINGTON ISSUED AT NEWBURGH ON THE HUDSON, 1782-1783, at 34-35 (Edward C. Boynton, ed., 1883) (reprint 1909) (Order of August 7, 1782). Such false representations not only dishonor the decorations and medals themselves, but dilute the select group of those who have earned the nation's gratitude for their valor. Every nation needs to honor heroes, to thank them for their selflessness and to hold them out as an example worthy of emulation. The harm flowing from those who have crowned themselves unworthily is surely self-evident.

The majority finds Congress's purpose inadequate because the Act is not expressly *limited* to statements that cause harm, *see* Maj. Op. at 1209-10 ("[W]hile the 'Findings' identify the injury the Act targets, they do not actually limit the *application* of the Act."), and because "[t]here is no requirement in the Act that the government bear the burden to *prove* that the *defendant's* speech or writing proximately caused damage to the reputation and meaning of military decorations and medals," *id.* (emphases added). Because the majority finds "no readily apparent reason for assuming, without specific proof, that the reputation and meaning of military decorations is harmed *every time* someone lies about having received one," the majority holds the Act unconstitutional. *Id.* (emphasis added).

But the government does not have to prove, on a case-by-case basis, that the statement of a *single defendant* damaged the reputation of a military award. The

obscenity cases are again instructive. In *Paris Adult Theatre I*, the Court rejected the cry for "scientific data . . . demonstrat[ing] that exposure to obscene material adversely affects men and women or their society." 413 U.S. at 60, 93 S. Ct. 2628. Instead, the Court said that legislatures could rely on "various unprovable assumptions," the same kinds of "assumptions [that] underlie much lawful state regulation of commercial and business affairs," such as federal securities laws, antitrust laws, environmental laws, and a "host" of others. *Id.* at 61-62, 93 S. Ct. 2628. Even in areas touched by the First Amendment, "[t]he fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional." *Id.* at 62, 93 S. Ct. 2628. Given the impossibility of proving the kind of "reputational harm" demanded by the majority, it is no wonder that neither Congress nor the Constitution requires it.

What would Alvarez have had to say to satisfy the majority's newfound harm standard? The majority itself concedes that Alvarez's statement was a "deliberate and despicable [lie]," Maj. Op. at 1216, that it was a "worthless, ridiculous, and offensive untruth[]," and that Alvarez "was proven to be nothing more than a liar," *id.* at 1217. He was indeed "more" than that. The hubris of Alvarez's claim to have received the Congressional Medal of Honor in 1987 may not be apparent to ordinary Americans, and it may not have been obvious at the joint meeting of the water districts, but it would not have been lost on the men and women who are serving or have served in our armed forces. By his statement, Alvarez claimed status in a most select group: American servicemen who lived to receive the Congressional

Medal of Honor. No living soldier has received the Congressional Medal of Honor since the Vietnam War. Greg Jaffe and Craig Whitlock, *Pentagon Recommends Medal of Honor for a Living Soldier*, THE WASHINGTON POST, July 1, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063005346.html(last visited July 6, 2010). Indeed, no Congressional Medal of Honor was awarded to any soldier participating in the Gulf War, and for our conflicts over the past decade, only two were awarded for actions in Somalia, four for actions in Iraq, and two for actions in Afghanistan-all posthumously. *Id.* Alvarez's statements dishonor every Congressional Medal of Honor winner, every service member who has been decorated in any away, and every American now serving. Such "insolence . . . [may] be . . . punished."[14]

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Alvarez's knowing lie is not entitled to constitutional protection. Thus, there is no need to subject the Stolen Valor Act to strict scrutiny. I would hold that the Stolen Valor Act is constitutional as applied to him. I turn now to Alvarez's facial challenge.

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[14] The government might well be able to supply further evidence of the harm caused by false claims of military awards. The government did not brief this matter because Alvarez never argued that false statements of fact fall outside of First Amendment protection only if they produce a cognizable harm. Given the novelty of the majority's holding, it is not surprising that the government did not anticipate it.

III

The majority holds that the Act is "facially invalid under the First Amendment." Maj. Op. at 1217. Some of the majority's analysis sounds in the overbreadth doctrine, but because the majority does not actually apply this doctrine, its facial holding is presumably based on the reasoning "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). This is not surprising given that the majority believes that the Act is unconstitutional as applied to Alvarez, who is perhaps the prototypical candidate for a constitutional application of the Act. Because I believe that the Act is constitutional as applied to Alvarez, my conclusion regarding the facial constitutionality of the Act necessarily rests on a discussion of Alvarez's overbreadth challenge. I would hold that because any overbreadth of the Act can be eliminated by construction and is, in any event, far from "substantial," *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), the Act is facially constitutional.

The overbreadth doctrine is, literally, an extraordinary doctrine, because it represents an exception to the usual rules of Article III standing. Ordinarily, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick*, 413 U.S. at 610, 93 S. Ct. 2908. However, the Supreme Court has carved out an exception to this standing doctrine in the First Amendment area because "the First Amendment needs breathing space" and an overly broad statute can result in intolerable self-censorship.

Id. at 611, 93 S. Ct. 2908. Thus, the Court has "permitted [litigants] to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612, 93 S. Ct. 2908. "If such an overbreadth challenge succeeds, the prosecution fails regardless of the nature of the defendant's own conduct," *Wurtz v. Risley*, 719 F.2d 1438, 1440 (9th Cir. 1983), because a successful overbreadth challenge renders a statute unconstitutional and, therefore, "invalid in *all* its applications," *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). Thus, the doctrine is employed "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908.

In *Broadrick*, the Court announced what has become the fundamental rule in the First Amendment overbreadth analysis: in order for a statute to be held unconstitutionally overbroad, "the overbreadth of [the] statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S. Ct. 2908 (emphasis added).[15]

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[15] *Broadrick* dealt with a regulation of activities that had a First Amendment component but that were not "pure speech." 413 U.S. at 615, 93 S. Ct. 2908. In *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), the Court extended *Broadrick*'s requirement of substantial overbreadth to cases involving "pure speech." *See id.* at 772, 102 S. Ct. 3348 (reasoning that *Broadrick*'s rationale "appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech"); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 n.12, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985) ("The Court of Appeals

"[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. . . . [T]here must be a realistic danger that the statute itself will *significantly* compromise recognized First Amendment protections . . . for it to be facially challenged on overbreadth grounds." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (emphasis added). The Court elaborated on the meaning of "substantial" overbreadth in *New York State Club Association v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988), and held that the party challenging the law must demonstrate not just from the text of the statute but also "*from actual fact* that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." *Id.* at 14, 108 S. Ct. 2225 (emphasis added). And in *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008), the Court suggested that *Broadrick*'s rule actually involves two requirements, namely that the statute's overbreadth must be substantial (1) "in an absolute sense" and (2) "relative to the statute's plainly legitimate sweep." *Id.* at 292, 128 S. Ct. 1830 ("[W]e have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.").

In sum, the party asserting the overbreadth challenge has a difficult burden to satisfy: he must demonstrate that the statute is substantially overbroad both in

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erred in holding that the *Broadrick* . . . substantial overbreadth requirement is inapplicable where pure speech rather than conduct is at issue. [*Ferber*] specifically held to the contrary.").

an absolute sense and relative to the legitimate sweep of the statute, *id.*, and must make such a showing based both on the text of the statute and on actual fact, *N.Y. State Club*, 487 U.S. at 14, 108 S. Ct. 2225.

Although the majority opinion does not formally apply overbreadth analysis to the Stolen Valor Act, it does provide a number of examples of speech potentially reached by the Act that are not present in Alvarez's particular case. Thus, I will conduct my overbreadth analysis using these examples and those provided by Alvarez. Based on the majority's and Alvarez's examples, the Stolen Valor Act could arguably be held unconstitutionally overbroad for two main reasons: (1) the Act does not contain a scienter requirement and might, therefore, reach inadvertent violations of the Act; and (2) the Act could be applied to satire or imaginative expression. I address each of these potential applications of the Act in turn.

A

The majority proclaims that the Act is unconstitutional because it "does not require a malicious violation, nor does it contain any other requirement or element of scienter. . . . Without a scienter requirement to limit the Act's application, the statute raises serious constitutional concerns . . . because the First Amendment clearly prohibits criminally punishing negligent speech about matters of public concern." Maj. Op. at 1209 (citing *Gertz*, 418 U.S. at 340, 347, 94 S. Ct. 2997). It is not clear from the majority's opinion exactly what it means by a "negligent" false claim of military honor, but the only plausible instance of such negligence that I can conceive of is an ambiguous statement that is incorrectly understood to have claimed receipt of a military award,

when in fact the person did not actually make any such claim.[16] For example, one could imagine a person saying "I have a Medal of Honor" and someone mistakenly interpreting him to mean that he has been *awarded* the Congressional Medal of Honor, even though the speaker means only that he merely *possesses* it, perhaps as a family heirloom.

However, such mistaken false statements do not present a constitutional problem for the Act. First, the Act is amenable to a reasonable construction that precludes its application to these kinds of statements. Second, even if the Act could be interpreted to reach these kinds of mistaken false statements, and even if such statements were entitled to constitutional protection (which is not clear), this potential sweep of the Act does not even come close to "substantial" overbreadth.

1

The first step in the overbreadth analysis is to determine whether the Stolen Valor Act actually covers statements that can be mistakenly interpreted to be false claims of military awards. *See Williams*, 553 U.S. at 293, 128 S. Ct. 1830 ("The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). Crucially, the Supreme Court has established that "[f]acial overbreadth has not been invoked when a limiting construc-

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[16] Another conceivable "negligent" or "mistaken" claim is one in which the speaker mistakenly *believes* that he has won a military award, but I do not consider it realistic that a person (let alone a substantial number of people) would mistakenly believe that he has been awarded a "decoration or medal authorized by Congress for the Armed Forces of the United States." 18 U.S.C. § 704(b).

tion has been *or could be* placed on the challenged statute." *Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908 (emphasis added); *see also Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 39 L. Ed. 297 (1895) ("[E]very reasonable construction must be resorted to in order to save a statute from unconstitutionality."). In other words, even if the Act could *possibly* be interpreted to reach some constitutionally protected speech, the Act will not be held unconstitutionally overbroad if it is *also* "'readily susceptible'" to a construction that eliminates such overbreadth. *Stevens*, 130 S. Ct. at 1592 (quoting *Reno v. ACLU*, 521 U.S. 844, 884, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)).[17]

The Stolen Valor Act punishes a person who "falsely *represents* himself or herself" to have received a military award authorized by Congress. 18 U.S.C. § 704(b) (emphasis added). Webster's first definition of the word "represent" is "[t]o bring clearly before the mind: [to] cause to be known . . . : [to] present esp. by description." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1926 (2002). Under this definition, an ambiguous statement that could conceivably be misinterpreted to claim receipt of a military award could not be punished under the Act because such a statement would not "bring clearly before the mind" of the listener that the speaker has described himself as having won the award, particularly when (as will almost always be the case) the

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[17] Although a reasonable limiting construction saves a statute from being held facially overbroad, the government's promise of reasonable prosecutorial discretion does not. *See Stevens*, 130 S. Ct. at 1591 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

context of the statement makes it obvious that the speaker is not making such a representation.

For example, Congress has made no attempt to preempt the use of the phrase "medal of honor," and any number of universities and high schools award some kind of a "medal of honor." The recipients may truthfully represent themselves as "medal of honor" winners, but no one should fear prosecution under the Stolen Valor Act. Congress was quite careful to define "decoration[s] or medal[s]" as those "authorized by Congress for the Armed Forces of the United States." 18 U.S.C. § 704(b). And in the special case of the Medal of Honor, Congress described it as "a *Congressional* Medal of Honor"—presumably to distinguish it from other medals of honor—and defined it as "a medal of honor awarded under [10 U.S.C. §§ 3741, 6241, or 8741, or 14 U.S.C. § 491]." 18 U.S.C. § 704(c)(2)(A) (emphasis added). No one reading the Act should have any question that he or she may continue to use the term "medal of honor" to denote those medals of honor awarded by our nation's educational institutions. The Stolen Valor Act reaches only those who claim to have received the Congressional Medal of Honor, as defined in the U.S. Code.

In sum, as long as the Act is correctly applied according to a reasonable interpretation of the word "represents," it will not sweep in ambiguous statements that can merely be mistakenly interpreted as a false claim of a congressionally authorized military award. Thus, because a reasonable "limiting construction"—indeed, the most reasonable construction—can be placed on the word "represent" that precludes its application to such statements, the Act is not overbroad in this regard.

Broadrick, 413 U.S. at 613, 93 S. Ct. 2908; *see also Hooper*, 155 U.S. at 657, 15 S. Ct. 207.

2

Even if mistaken false statements were theoretically subject to punishment under the Stolen Valor Act, common sense tells us that such punishment will be extraordinarily rare if not nonexistent, both "in an absolute sense" and "relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292, 128 S. Ct. 1830. In an absolute sense, Alvarez cannot (and has not even attempted to) demonstrate "from *actual fact*" that there is a "realistic danger" or that "a substantial number of instances exist in which" mistaken statements will be charged under the Act. *N.Y. State Club*, 487 U.S. at 11, 14, 108 S. Ct. 2225 (emphasis added); *Taxpayers for Vincent*, 466 U.S. at 801, 104 S. Ct. 2118. Both Alvarez and the majority have failed to identify a single instance in which the Act has been applied in a context other than Alvarez's: a simple lie about receiving a military honor.

Any overbreadth of the Act is also far from substantial "relative to the statute's plainly legitimate sweep," *Williams*, 553 U.S. at 292, 128 S. Ct. 1830, because, "[i]n the vast majority of its applications, [the Act] raises no constitutional problems whatsoever," *id.* at 303, 128 S. Ct. 1830. False claims of military valor have been increasing: "The FBI investigated 200 stolen valor cases last year and typically receives about 50 tips a month, triple the number that came in before the September 2001 terrorist attacks." Christian Davenport, *One Man's Database Helps Uncover Cases of Falsified Valor*, THE WASHINGTON POST, May 10, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050903363.html?hpid=

topnews (last visited July 6, 2010); *see also* Keith Rogers, *Prosecuting Fraud Cases: Military Imposters Targeted*, LAS VEGAS REVIEW-JOURNAL, June 25, 2010, *available at* http://www.lvrj.com/news/military-impostors-targeted-97141054.html (last visited July 6, 2010) ("The problem of [military imposters] is fast reaching epidemic proportions." (quotation marks omitted)). And again, neither the majority nor Alvarez has pointed to even one case involving a person who was mistakenly interpreted to have claimed a military award. Thus, this seems to me "the paradigmatic case of a . . . statute whose legitimate reach dwarfs its arguably impermissible applications." *New York v. Ferber*, 458 U.S. 747, 773, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *see also Magill v. Lynch*, 560 F.2d 22, 30 (1st Cir. 1977) ("Some sensitivity to reality is needed; an invalid application that is far-fetched does not deserve as much weight as one that is probable.").

This case falls far short of the level of overbreadth that the Supreme Court has found to be "substantial." In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), for example, the Court was faced with a federal statute that "extend[ed] the federal prohibition against child pornography to sexually explicit images that appear[ed] to depict minors but were produced without using any real children," thus "proscrib[ing] a significant universe of speech" that fell within neither the unprotected category of obscenity under *Miller* nor the unprotected category of child pornography under *Ferber*. *Id.* at 239-40, 122 S. Ct. 1389. The Court held that the statute was "substantially overbroad and in violation of the First Amendment." *Id.* at 258, 122 S. Ct. 1389. In so holding, the Court reasoned that "teenage sexual activity and the sexual abuse of

children[ ] have inspired *countless* literary works," both ancient and contemporary, which "explore themes within the wide sweep of the statute's prohibitions." *Id.* at 247-48, 122 S. Ct. 1389 (emphasis added).

More recently, in *Stevens*, the Court addressed a statute establishing a criminal penalty for anyone who knowingly "create[d], s[old], or possesse[d] a depiction of animal cruelty," where a "depiction of animal cruelty" was defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." 130 S. Ct. at 1582; 18 U.S.C. § 48(a), (c)(1). In holding that the statute was unconstitutionally overbroad, the Court "read § 48 to create a criminal prohibition of *alarming breadth*," emphasizing that the language of the statute would sweep in the "*enormous national market* for hunting-related depictions in which a living animal is intentionally killed," and that "[t]hose seeking to comply with the law [would] face a bewildering maze of regulations from at least 56 separate jurisdictions." *Stevens*, 130 S. Ct. at 1588-89 (emphases added). "The demand for hunting depictions exceed[ed] the estimated demand" for depictions that Congress could legitimately proscribe. *Id.* at 1589; *see also, e.g., Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987) (invalidating an ordinance that, "by prohibiting *all* protected expression [at Los Angeles International Airport], purport[ed] to create a virtual 'First Amendment Free Zone' at [the airport]," potentially covering "virtually every individual who enter[ed] [the airport]").

The statutes that we have held to be facially overbroad have also been significantly broader than the Stolen Valor Act. In *Wurtz*, for example, we addressed the

constitutionality of Montana's "intimidation statute," which punished both constitutionally proscribable threats and those protected by the First Amendment. 719 F.2d at 1439, 1441. We held that the statute was unconstitutionally overbroad because it would sweep in "*many* relatively harmless expressions," including such common expressions as "[t]hreats of sit-ins, marches in the street, mass picketing and other such activities." *Id.* at 1442 (emphasis added). We concluded that the statute "applie[d] so broadly to threats of minor infractions, to threats not reasonably likely to induce a belief that they will be carried out, and to threats unrelated to any induced or threatened action, that a *great deal* of protected speech [wa]s brought within the statute." *Id.* (emphasis added).

These cases illustrate the kind of significant overbreadth that satisfies the *Broadrick* standard. If the requirement of *substantial* overbreadth is to have any meaning, it compels the conclusion that, because there is virtually no potential for punishment of mistaken claims of military awards, the Act is not unconstitutionally overbroad in this regard.

B

Second, the majority argues that the Act might be applied to satire or other kinds of imaginative expression—such as a person who claims he has received a military decoration sarcastically, or while playing a role in a play or movie—and thus criminalizes even those statements that are plainly incredible and not worthy of actual belief. *See* Maj. Op. at 1213-14. The majority states: "[W]hether it be method actors getting into character, satirists being ironic or sarcastic, poets using hyperbole, or authors crafting a story, creative persons

often make factual statements or assertions which, as they are fully aware, are entirely untrue." *Id.* at 1214. The majority presents examples of "[s]atirical entertainment such as The Onion, The Daily Show, and The Colbert Report." *Id.* at 1213.

Although the Supreme Court has never so held, I am quite confident that satirical or theatrical statements claiming receipt of a military award are protected under the First Amendment. Provocative statements by satirists are not generally thought to come within the class of unprotected "false statements of fact" because these statements "could not reasonably [be] interpreted as stating actual facts." *Hustler*, 485 U.S. at 50, 108 S. Ct. 876; *see also Milkovich*, 497 U.S. at 20, 110 S. Ct. 2695.

But claims about military decorations and medals made in an artistic context are not subject to prosecution under the most reasonable construction of the Act. Once again, "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613, 93 S. Ct. 2908. Since the first definition of the word "represent" is "[t]o bring clearly before the Mind," WEBSTER'S at 1926, the Act can plausibly be interpreted to preclude its application to statements that cannot "reasonably [be] interpreted as stating actual facts," *Hustler*, 485 U.S. at 50, 108 S. Ct. 876, because statements that cannot reasonably be interpreted to be true would not "bring clearly before the mind" of the listener that the speaker is stating actual facts about himself.

If, for example, Stephen Colbert mocked a president's statement that he had "won" an ongoing war by proclaiming, sarcastically, "Right—and I won the Congressional Medal of Honor," I doubt that anyone would

think that Colbert had "represented" himself as a Medal of Honor winner. Or, to take a second example, actor Tom Hanks "received" the Medal of Honor in the movie *Forrest Gump*. In fact, Lieutenant Dan could not have made it clearer in the movie that Forrest had received the Congressional Medal of Honor:

> Lt. Dan: They gave you the Congressional Medal of Honor.
>
> Forrest: Now that's Lieutenant Dan. Lieutenant Dan!
>
> Lt. Dan: They gave you the Congressional Medal of Honor!
>
> Forrest: Yes sir, they sure did.
>
> Lt. Dan: They gave you[,] an imbecile, a moron who goes on television and makes a fool out of himself in front of the whole damn country, the Congressional Medal of Honor.
>
> Forrest: Yes sir.

Forrest Gump (1994), *available at* http://www.generationterrorists.com/quotes/.html (last visited July 6, 2010); *see also The Karate Kid* (1984) (representing that Mr. Miyagi, played by actor Pat Morita, had received the Congressional Medal of Honor for his heroism in World War II); *The Next Karate Kid* (1994) (showing Mr. Miyagi wearing the Congressional Medal of Honor). But we all understood the context: Tom Hanks *qua* Forrest Gump received the Medal of Honor. Forrest Gump cannot be charged with violating the Act and, so far as I am aware, Tom Hanks *qua* Tom Hanks has never "represented himself" as a Medal of Honor recipient. I do not believe it realistic that anyone would

think to accuse Colbert or Hanks of violating the Stolen Valor Act in these contexts. Assuming, as I must, that the Act will be applied with some modicum of common sense, it does not reach satire or imaginative expression.

* * * * * *

I would conclude that the Act is reasonably susceptible to a limiting construction that eliminates any potential overbreadth and, even if the Act did have some degree of overbreadth, this overbreadth is not "substantial." I would hold that the Act is not overbroad and therefore facially constitutional.

IV

The majority's opinion is provocative, to say the least. It effectively overrules *Gertz* and its progeny and holds that false statements of fact generally receive First Amendment protection. It effectively overrules *Garrison* by holding that even *knowingly* false statements of fact are protected. It holds that a false statement of fact must produce "irreparable harm" in order to lose First Amendment protection, thus wholly confusing the concept of unprotected speech and calling into question the Supreme Court's obscenity jurisprudence. And it strikes down an act of Congress on its face despite the most important consideration to this case: no person has ever been subjected to an unconstitutional prosecution under the Stolen Valor Act and, under any reasonable interpretation of the Act, it is extremely unlikely that anyone ever will be.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-50345

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

XAVIER ALVAREZ, AKA JAVIER ALVAREZ, DEFENDANT-APPELLANT

Filed: Mar. 21, 2011

ORDER

Before: THOMAS G. NELSON, JAY S. BYBEE, and MILAN D. SMITH, JR., Circuit Judges.

Judges T.G. Nelson and M. Smith have voted to deny the petition for panel rehearing. Judge M. Smith has voted to deny the petition for rehearing en banc, and Judge T.G. Nelson has so recommended. Judge Bybee has voted to grant the petition for panel rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is DENIED.

M. SMITH, Circuit Judge, with whom KOZINSKI, Chief Judge, joins, concurring in the denial of rehearing en banc:

I concur in the court's decision not to rehear this case en banc, and write to respond to the dissents from that decision.

This case presents two issues: (1) Does the government bear the burden of proof to show that speech forbidden by the Stolen Valor Act (the Act), 18 U.S.C. § 704(b), is unprotected by the First Amendment, or does a criminal defendant charged under the Act bear the burden of proof to show that the targeted speech is protected by the First Amendment? (2) Is the speech forbidden by the Act protected by the First Amendment, or does it fall into one of the "well-defined and narrowly limited classes of speech" that is unprotected by the First Amendment, *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (internal quotation mark omitted)?

The Act provides:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b). The prescribed prison term is increased to one year if the decoration involved is the Medal of Honor, a distinguished-service cross, a Navy cross, an Air Force cross, a silver star, or a Purple Heart. *Id.* § 704(c), (d).

Xavier Alvarez won a seat on the Three Valley Water District Board of Directors in 2007. On July 23, 2007, at a joint meeting with a neighboring water district board, newly-seated Director Alvarez introduced himself, stating "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around." With the exception of "I'm still around," Alvarez's statement was a series of bizarre lies, and Alvarez was indicted and convicted for falsely claiming that he had been awarded the Medal of Honor.

Although the majority and Judges O'Scannlain, Gould, and Bybee (sometimes referred to collectively as the Dissenters) disagree regarding the correct answers to the questions noted *supra*, we agree on several key underlying issues. First, we all agree that the Act "seek[s] to regulate 'only . . . words,'" *Broadrick v.*

Oklahoma, 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)), that the Act targets words about a specific subject (military honors), and that the Act is plainly a content-based regulation of speech. *See United States v. Alvarez*, 617 F.3d 1198, 1218-19 (9th Cir. 2010) (Bybee, J., dissenting). Second, because the Act imposes a content-based restriction on speech, it is subjected to strict scrutiny, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), unless the speech it criminalizes falls into one of the "well-defined and narrowly limited classes of speech" that is unprotected by the First Amendment, *Stevens*, 130 S. Ct. at 1584 (internal quotation mark omitted).

There is also no meaningful dispute between the majority and the Dissenters concerning whether the Act survives strict scrutiny if it does not fall into one of the *Stevens* subcategories of speech that is unprotected by the First Amendment. For example, Judge Bybee acknowledged that "if the Stolen Valor Act were subjected to strict scrutiny, the Act would not satisfy this test." *Alvarez*, 617 F.3d at 1232 n.10 (Bybee, J., dissenting) (emphasis omitted). The majority and the Dissenters also agree that the Government neither proved, nor was required to prove, that Alvarez's statements helped him to obtain tangible or intangible benefits, was part of a legal proceeding, involved certifying the truth of an official document, or caused harm to anyone else.

We also note that the majority opinion does not impugn the reputation of any of our brave men and women in uniform. On the contrary. The strict scrutiny analysis of the majority opinion affirms that our men and

women in uniform put themselves in harm's way because they are honorable and brave, and not because they seek to be awarded one or more of the medals covered by the Act.

DISCUSSION

The first dispute between the majority and the Dissenters asks who bears the burden of proof in this case. The Dissenters, drawing almost entirely on defamation case law, suggest that we should invert the ordinary First Amendment burden in *all* cases involving false statements, even if criminal charges are involved. *Alvarez*, 617 F.3d at 1228-29, 1234 (Bybee, J., dissenting); O'Scannlain Dissent at 679-80, 681. But this approach inverts the burdens of proof and persuasion mandated by the Supreme Court by requiring criminal defendants to show that their speech covered by the Act falls into the categories of speech protected by the First Amendment, instead of requiring the government to prove that the targeted speech is not so protected. Ordinarily, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," and "the risk of nonpersuasion . . . must rest with the Government, not with the citizen." *Playboy Entm't Grp.*, 529 U.S. at 816, 818, 120 S. Ct. 1878; *see also Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."). This general rule applies with even more force in criminal cases such as this one, because the Constitution "protects the accused against conviction except up-

on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In addressing the second question, the Dissenters rely heavily on isolated comments made by Supreme Court Justices in First Amendment cases without examining the context in which those statements were made, or the actual holdings in those cases. In each of these opinions, the Court has made clear that false speech is *not* subject to a blanket exemption from constitutional protection.

Tellingly, the Dissenters' discussion of Supreme Court case law begins with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), rather than *Gertz*'s predecessor, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). *Sullivan* held that libel laws are unconstitutional unless they include a scienter element. In reaching this conclusion, the Court asked whether speech "forfeits [First Amendment] protection by the falsity of some of its factual statements and by its alleged defamation of respondent," and held, unequivocally, that it does not. *Id.* at 271, 84 S. Ct. 710. The Court explained:

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . . The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." In *Cantwell v. Connecticut*,

> 310 U.S. 296, 310 [60 S. Ct. 900, 84 L. Ed. 1213] [(1940)], the Court declared: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Id. (citations omitted). The Court accordingly concluded that "[t]hat erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive." *Id.* at 271-72, 84 S. Ct. 710 (internal quotation marks omitted). The Court added that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Id.* at 279 n.19, 84 S. Ct. 710 (quoting J.S. Mill, *On Liberty* 15 (Oxford: Blackwell, 1947)).

Rather than addressing *Sullivan*'s clear statement that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth," *id.* at 271, 84 S. Ct. 710, the Dissenters rely heavily on the Court's post-*Sullivan* case law. Yet none of these cases contradicts *Sullivan*'s holding that at least *some* false statements

are entitled to First Amendment protection. The Dissenters primarily rely on *Gertz* and its progeny for the proposition that "the erroneous statement of fact is not worthy of constitutional protection." 418 U.S. at 340, 94 S. Ct. 2997. In *Gertz*, the Court classified false statements of fact as "belong[ing] to that category of utterances" that "'are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)). Thus, the Dissenters conclude, regulations of false factual speech may be proscribed without constitutional problem—or even any constitutional scrutiny.

Like *Sullivan*, *Gertz* (the earliest of the post-*Sullivan* cases cited by the Dissenters) was a defamation case. Judge O'Scannlain's Dissent repeatedly quotes *Gertz* for the proposition that "the erroneous statement of fact is not worthy of constitutional protection," *see* O'Scannlain Dissent at 678, 682, but *Gertz* also explained that such untrue statements are "nevertheless inevitable in free debate." 418 U.S. at 340, 94 S. Ct. 2997. The *Gertz* Court then added: "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341, 94 S. Ct. 2997. Thus, recognizing this need to protect "speech that matters," the Court endeavored to find a balance in defamation cases between the "legitimate state interest in compensating private individuals for wrongful injury to reputation," and the First Amendment requirement of "shield[ing] the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 348, 94 S. Ct. 2997. The Court accordingly held that plaintiffs must show some level of fault by the defendant, and further held

that plaintiffs may only receive compensation for "actual injury" if it is "supported by competent evidence concerning the injury." *Id.* at 350, 94 S. Ct. 2997.

In other words, although *Gertz* stated that false statements are not inherently worthy of First Amendment protection,[1] the Court did not hold that "'false statements of fact' are categorically unprotected." O'Scannlain Dissent at 684 (quoting *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997). Rather, *Gertz* held that defamatory statements are unprotected if they are *made with a culpable state of mind* and *cause injury* to another person. This is exactly what it had held a decade earlier in *Sullivan* and *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), which only permitted defamation actions in which there is "an intent to inflict harm through falsehood." *Id.* at 73, 85 S. Ct. 209. If *Gertz* stood for the proposition that false statements are *per se* unprotected (as the Dissenters suggest), then the *Gertz* majority's reasoning would likely have looked much more like Justice White's dissent. *Compare Gertz*, 418 U.S. at 347 n.10, 94 S. Ct. 2997 (majority opinion), *with id.* at 375-76, 94 S. Ct. 2997 (White, J., dissenting).

In sum, "*Gertz*'s statement that false factual speech is unprotected, considered in isolation, omits discussion of essential constitutional qualifications on that proposition." *Alvarez*, 617 F.3d at 1203. Although the Court has stated that false statements of fact are *unworthy* of First Amendment protection, the Court has never held

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[1] *But see Sullivan*, 376 U.S. at 279 n.19, 84 S. Ct. 710 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting Mill, *supra*, at 669)).

that false speech is *per se*, or even *presumptively, unprotected* by the First Amendment. Indeed, one of the current members of the Court, while working as a law professor, recognized "[t]he near absolute protection given to false but nondefamatory statements of fact outside the commercial realm." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 477 (1996).

Consistent with this principle, the Court's standard list of categorically exempt speech has *never* used the phrase "false statements of fact." Instead, the Court has limited itself to using the words defamation (or libel) and fraud. Most recently, the Court wrote: "These historic and traditional categories [of unprotected speech] long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Stevens*, 130 S. Ct. at 1584 (citations and internal quotation marks omitted). Similar formulations have been used for at least six decades, and the Court has *never* included "false statements of fact" in its list.[2] As

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[2] *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (listing obscenity, defamation, and fighting words); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (Kennedy, J., concurring) (listing "obscenity, defamation, incitement, or situations presenting some grave and imminent danger the government has the power to prevent" (citations omitted)); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) ("Libelous speech has been held to constitute one such category [of unprotected speech]; others that have been held to be

Judge O'Scannlain's Dissent appears to acknowledge, *all* of the cases and statutes he relies upon either fit within one of the categories discussed in *Stevens* (or its predecessors) or were subjected to First Amendment scrutiny.[3]

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outside the scope of the freedom of speech are fighting words, incitement to riot, obscenity, and child pornography." (citations omitted)); *New York v. Ferber*, 458 U.S. 747, 763, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (listing fighting words, libel, and obscenity); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 592-93, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (Rehnquist, J., dissenting) (listing fighting words, group libel, obscenity, and false and misleading commercial speech); *Sullivan*, 376 U.S. at 269, 84 S. Ct. 710 (listing "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, [and] solicitation of legal business" (footnotes omitted)); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961) (listing "libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like"); *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (listing "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words").

[3] Although Judge O'Scannlain is correct that "not *all* of the cases in this area deal with defamation," O'Scannlain Dissent at 683 n.6, he is also correct that *many* of them *do*. O'Scannlain Dissent at 683. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984); *Herbert v. Lando*, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); *Gertz*, 418 U.S. 323, 94 S. Ct. 2997; *Sullivan*, 376 U.S. 254, 84 S. Ct. 710. Another case he cites involves fighting words, which also fit into the *Stevens* categories of First Amendment-exempt speech. *Chaplinsky*, 315 U.S. 568, 62 S. Ct. 766.

Judge O'Scannlain collects a number of federal and state laws prohibiting various forms of fraud and perjury. O'Scannlain Dissent at 684-85; *see also* Black's Law Dictionary 1254 (9th ed. 2009) (defining "perjury" broadly as "[t]he act or an instance of a person's deliberately making material false or misleading statements while under oath"). Fraud, of course, is covered by *Stevens*'s categories, and perjury is

To the extent the Court has articulated a test for determining whether a certain type of speech belongs on that list, the test is whether "[f]rom 1791 to the present," that speech has been "historically unprotected." *Stevens*, 130 S. Ct. at 1584-86. Usually, in cases involving such types of speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Ferber*, 458 U.S. at 763-64, 102 S. Ct. 3348; *see also Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (explaining that unprotected categories of speech "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

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included in a similar list in *Konigsberg*, 366 U.S. at 49 n. 10, 81 S. Ct. 997.

Judge O'Scannlain also cites a series of cases discussing anticompetitive "sham" litigation. *E.g., BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982). These cases stand for the narrow and uncontroversial proposition that "there is simply no basis to hold that deliberately misrepresenting facts to an administrative [or judicial] body for anticompetitive purposes enjoys blanket first amendment protection." *Clipper Exxpress*, 690 F.2d at 1262.

Finally, Judge O'Scannlain cites a pair of cases that *refused* to recognize new exceptions to the First Amendment. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) ("[T]he sort of expression involved in this case [intentional infliction of emotional distress] does not seem to us to be governed by any exception to the general First Amendment principles stated above."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) ("[C]ommercial speech, like other varieties, is protected. . . .").

However, the Court has cautioned against reliance on a "freewheeling" "cost-benefit analysis." *Stevens*, 130 S. Ct. at 1586. The Court has also explained that *Chaplinsky* and its successors "do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor." *Id.* Instead, the exclusive test is whether the "categor[y] of speech . . . ha[s] been historically unprotected." *Id.*[4] Tellingly, in *Stevens*, the Court found the government's proposed "free-floating test for First Amendment coverage," to be "startling and dangerous," and went on to say that "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that

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[4] Consistent with its historical test, the Court has collected authorities showing that all of the categories listed in *Stevens* have traditionally been regulated by Congress and the states. *See Roth v. United States*, 354 U.S. 476, 482-83, 485, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) (obscenity and libel); *Beauharnais v. Illinois*, 343 U.S. 250, 254-55, 72 S. Ct. 725, 96 L. Ed. 919 (1952) (libel); *Donaldson v. Read Magazine*, 333 U.S. 178, 190-91, 68 S. Ct. 591, 92 L. Ed. 628 (1948) (fraud); *Chaplinsky*, 315 U.S. at 571 n.2, 62 S. Ct. 766 (cited in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)) (speech integral to criminal conduct); *see also United States v. Smull*, 236 U.S. 405, 408 & n.1, 35 S. Ct. 349, 59 L. Ed. 641 (1915) (cited in *United States v. Dunnigan*, 507 U.S. 87, 94-95, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993)) (perjury).

judgment simply on the basis that some speech is not worth it." *Id.* at 1585.[5]

The Dissenters fail to identify a body of historical authorities showing broad regulation of *false statements of fact*. They contend that "[t]he fact that one of the Court's most recent statements on unprotected categories of speech did not expressly mention 'false statements of fact' sheds little, if any, light on the historical protection of such speech." O'Scannlain Dissent at 684. True, but irrelevant. The Dissenters have not even attempted to trace their purported "false speech" exemption any further back than the 1960s.

In fact, the historical record regarding government regulation of false speech is problematic for the Dissenters.[6] Were they to identify historical support for such

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[5] Judge Gould's proposed approach cannot be reconciled with the *Stevens* Court's unequivocal rejection of ad hoc, case-by-case balancing tests. *See* Gould Dissent at 687-88.

[6] *See, e.g., Hale v. Everett*, 53 N.H. 9, 208 (1868) ("The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore, in any shape, is derogatory from sound morality, is not, however, taken notice of by our law unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompense is given."); Fred B. Hart, *Power of Government Over Speech and Press*, 29 Yale L. J. 410, 427 (1920) ("'The constitutional liberty of speech and of the press as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing except so far as such publications, from their blasphemy, obscenity or scandalous character may be a public offense, or as by their falsehood and malice may injuriously affect the standing,

regulation, the clearest precedent would be the much-maligned Alien and Sedition Act of 1798. That infamous act "made it a crime, punishable by a $5,000 fine and five years in prison, 'if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.'" *Sullivan*, 376 U.S. at 273-74, 84 S. Ct. 710 (quoting Sedition Act of 1798, 1 Stat. 596) (first four omissions in original). As explained in *Sullivan*, upon its passage this act "was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison." *Id.* at 274, 84 S. Ct. 710. The Court explained that the historical record contained a great deal of criticism of the act, and accordingly concluded that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276, 84 S. Ct. 710 (footnote omitted). I suspect that the Dissenters do not intend to resurrect the Alien and Sedition Act of 1798 as an exhibit in favor of their historical argument.

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reputation or pecuniary interests of individuals.'" (quoting Thomas Cooley, *Constitutional Limitations* 604-05 (6th ed. 1890))).

To the extent that spreading false news was a crime at common law, prosecutions under such laws appear to have died out by the late seventeenth century. *See* Larry D. Eldridge, *Before Zenger: Truth and Seditious Speech in Colonial America, 1607-1700*, 39 Am. J. Legal Hist. 337, 356 (1995) ("Increasingly, as the century went on, colonial officials simply investigated rumors [of violations of false news laws] and did little except publicly declare them to be false in an effort 'to quiet the minds of the people.'").

That said, the Dissenters acknowledge that the Supreme Court's case law does not clearly and uniformly support their contention that false speech is *always* unprotected. But they counter that the First Amendment protects only *some* false speech "in order to protect speech that matters." *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997. But the Dissenters do not even attempt to identify the types of speech that "matter." The Dissenters' "speech that matters" approach simply invites courts to complete an ever-expanding list, which would increasingly resemble the Kafkaesque world so well portrayed in Chief Judge Kozinski's concurrence in this case. *See* Kozinski Concurrence at 674-75. It goes without saying that such an "ad hoc," "free-wheeling," "case-by-case" approach is contrary to the Supreme Court's teachings in *Stevens*, and might even be among those the Court finds "startling and dangerous." *Stevens*, 130 S. Ct. at 1585-86.

The Dissenters may be correct that Congress may someday be able to redress the "reputational harm to the military" caused by conduct like Alvarez's. O'Scannlain Dissent at 685; *see generally* Gould Dissent. But "[*a*]*s presently drafted*, the Act is facially invalid under the First Amendment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar, without more." *Alvarez*, 617 F.3d at 1217 (emphasis added).

The Dissenters rely on the unsupportable doctrinal premise that false speech is categorically subject to government regulation and prohibition. For the reasons outlined *supra* and in my majority opinion, I respectfully disagree.

Chief Judge KOZINSKI, concurring in the denial of rehearing en banc:

According to our dissenting colleagues, "non-satirical and non-theatrical [ ] knowingly false statements of fact are *always* unprotected" by the First Amendment. *United States v. Alvarez*, 617 F.3d 1198, 1224 (9th Cir. 2010) (Bybee, J., dissenting); *see also* O'Scannlain dissent at 677-78; *cf.* Gould dissent at 687. Not "often," not "sometimes," but always. Not "if the government has an important interest" nor "if someone's harmed" nor "if it's made in public," but *always*. "Always" is a deliciously dangerous word, often eaten with a side of crow.

So what, exactly, does the dissenters' ever-truthful utopia look like? In a word: terrifying. If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review."

What the dissenters seem to forget is that Alvarez was convicted for pure speech. And when it comes to pure speech, truth is not the sine qua non of First Amendment protection. *See Meyer v. Grant*, 486 U.S. 414, 419, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988) ("The First Amendment is a value-free provision whose protection is not dependent on the truth, popularity or so-

cial utility of the ideas and beliefs which are offered." (internal quotation marks omitted)). That the government can constitutionally regulate some narrow categories of false speech—such as false advertising, defamation and fraud—doesn't mean that all such speech falls outside the First Amendment's bounds. As the Supreme Court has cautioned, "In this field every person must be his own watchman for the truth, because the forefathers did not trust any government to separate the true from the false for us." *Id.* at 419-20, 108 S. Ct. 1886 (internal quotation mark omitted); *Thomas v. Collins*, 323 U.S. 516, 545, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (Jackson, J., concurring). Yet the regime the dissenters agitate for today—one that criminalizes pure speech simply because it's false—leaves wide areas of public discourse to the mercies of the truth police.

Alvarez's conviction is especially troubling because he is being punished for speaking about himself, the kind of speech that is intimately bound up with a particularly important First Amendment purpose: human self-expression. As Justice Marshall explained:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's self worth and dignity.

Procunier v. Martinez, 416 U.S. 396, 427, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974) (Marshall, J., concurring). Accordingly, the Court has recognized that "[o]ne fundamental concern of the First Amendment is to 'protec[t] the individual's interest in self-expression.'" *Citizens*

United v. FEC, — U.S. —, 130 S. Ct. 876, 972, 175 L. Ed. 2d 753 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.2, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980)) (second alteration in original). Speaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts or tell tall tales. Self-expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all.

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings ("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost $10 at poker"); to prevent grief ("The doc says you're getting better"); to maintain domestic tranquility ("She's just a friend"); to avoid social stigma ("I just haven't met the right woman"); for career advancement ("I'm sooo lucky to have a smart boss like you"); to avoid being lonely ("I love opera"); to eliminate a rival ("He has a boyfriend"); to achieve an objective ("But I love you *so* much"); to defeat an objective ("I'm allergic to latex"); to make an exit ("It's not you, it's me"); to delay the inevitable ("The check is in the mail"); to communicate displeasure ("There's nothing wrong"); to get someone off your back ("I'll call you about lunch"); to escape a nudnik ("My mother's on the other line"); to namedrop ("We go way back"); to set up a surprise party ("I need help moving the piano"); to buy time ("I'm on my way"); to keep up appearances ("We're not talking divorce"); to avoid taking out the trash ("My back hurts"); to duck an

obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop").

And we don't just talk the talk, we walk the walk, as reflected by the popularity of plastic surgery, elevator shoes, wood veneer paneling, cubic zirconia, toupees, artificial turf and cross-dressing. Last year, Americans spent $40 billion on cosmetics—an industry devoted almost entirely to helping people deceive each other about their appearance. It doesn't matter whether we think that such lies are despicable or cause more harm than good. An important aspect of personal autonomy is the right to shape one's public and private persona by choosing when to tell the truth about oneself, when to conceal and when to deceive. Of course, lies are often disbelieved or discovered, and that too is part of the pull and tug of social intercourse. But it's critical to leave such interactions in private hands, so that we can make choices about who we are. How can you develop a reputation as a straight shooter if lying is not an option?

Even if untruthful speech were not valuable for its own sake, its protection is clearly required to give breathing room to truthful self-expression, which is unequivocally protected by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Americans tell somewhere between two and fifty lies each day. *See*

Jochen Mecke, *Cultures of Lying* 8 (2007). If all untruthful speech is unprotected, as the dissenters claim, we could all be made into criminals, depending on which lies those making the laws find offensive. And we would have to censor our speech to avoid the risk of prosecution for saying something that turns out to be false. The First Amendment does not tolerate giving the government such power.

Judge O'Scannlain tells us not to worry, because to say "[t]hat false statements of fact are always *unprotected* in themselves is not to say that such statements are always *subject to prohibition*." O'Scannlain dissent at 686. This is double talk. If a statement is "always unprotected" by the First Amendment then it's presumptively subject to regulation. That it may enjoy derivative protection by osmosis from "other speech that matters" is cold comfort to those who have no way of knowing in advance whether two judges of this court will recognize that relationship in any particular instance.

But it gets worse. Confronted with some of the many ways in which false speech permeates our discourse, Judge O'Scannlain comes up with new categories of exceptions to his regime—"expressions of emotion or sensation," "predictions or plans," "exaggerations" and "playful fancy." *Id.* at 686. "Such statements," we are told, "are not even implicated" by the dissenters' analysis because they are not "falsifiable." *Id.* But this is patently not true. If you tell a girl you love her in the evening and then tell your roommate she's a bimbo the next morning, and the two compare notes, someone's going to call you a liar. And if you tell the Social Security Commissioner, "I have disabling back pain," and are then discovered jogging, golfing and jet-skiing, it will be

no defense that you were merely expressing a "sensation" that is "non-falsifiable." Judge O'Scannlain also turns a tin ear to the complexity of human communication. "I just haven't met the right woman," could be a statement of opinion, as my colleague suggests, but more likely is a false affirmation of heterosexuality. And where, exactly, is the dividing line between an "exaggeration"—which Judge O'Scannlain seems to think always gets constitutional protection—and a lie, which never does?

The dissent dismisses these difficulties by creating a doctrine that is so complex, ad hoc and subjective that no one but the author can say with assurance what side of the line particular speech falls on. This not only runs smack up against the Supreme Court's admonition against taking an "'ad hoc,' 'freewheeling,' 'case-by-case' approach" in the First Amendment area, Smith concurrence at 673, but results in the "courts themselves . . . becom[ing] inadvertent censors." *Snyder v. Phelps*, — U.S. —, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011). And, as Judge Smith elegantly demonstrates, Judge O'Scannlain's approach compounds the danger of arbitrariness by "invert[ing] the ordinary First Amendment burden" in requiring the *speaker*—even in the case of a criminal defendant—to prove that his speech deserves protection. Smith concurrence at 667. Free speech simply cannot survive the kind of subjective and unpredictable regime envisioned by the dissenters.

Judge O'Scannlain is right that the scenario I describe is "far removed from the one in which we actually live," O'Scannlain dissent at 687, but only because the dissenters didn't prevail. Had they done so, we may

very well have come to live in a world more like a Hollywood horror film than the country we know and adore.

Perhaps sensing the danger of the absolutist approach, Judge Gould proposes a narrower rule, one that would carve away First Amendment protections for speech concerning (1) some (2) military matters (3) where the interest of the speaker is low. Judge Gould's dissent illustrates the dangers of announcing a hypothetical rule without the need to apply it to a concrete case. As I show below, all three legs supporting Judge Gould's theory buckle as soon as weight is placed on them.

Before I get to that, however, let me point out just how wrong it would be to convene an en banc court in order to adopt a rule such as that proposed by our colleague. En bancs are generally appropriate to correct a conflict with the law of our own circuit, another circuit or the Supreme Court. The enterprise Judge Gould proposes would serve none of these purposes. Instead, he would have the en banc court adopt a rule no other court has ever adopted and the Supreme Court has never hinted at. This strikes me as an unwise use of en banc resources.

But on to the rule Judge Gould proposes. He first posits that "the power of Congress [in dealing with military matters] is necessarily strong," but Congress has strong powers in many areas, including immigration and naturalization, U.S. Const. art. I, § 8, cl. 4; foreign relations, *id.* cl. 3; copyright and patent, *id.* cl. 8; bankruptcy, *id.* cl. 4; interstate commerce, *id.* cl. 3; tax, *id.* cl. 1; Native Americans, *id.* cl. 3; and the District of Columbia, *id.* cl. 17. Judge Gould doesn't explain why congressional power vis-a-vis the military is so much more impor-

tant than these other strong congressional powers, so as to merit its own First Amendment hall pass. Or, perhaps Judge Gould means to suggest that there should be a similar exception for, say, lying about being an immigrant or a bankrupt—which would make his exception far broader than he acknowledges.

Second, as Judge Gould recognizes, not all speech concerning military matters is unprotected by the First Amendment, else Congress could pretty much have banned the entire Vietnam protest movement—and no doubt would have. Lying about being a military hero is despicable and may have some impact on the government's ability to recruit genuine heroes, but it's hard to understand why it's so much worse than burning an American flag, displaying a profane word in court, rubbing salt into the fresh wounds of the families of fallen war heroes, suggesting that a revered religious leader commits incest with his mother in an outhouse or publishing military secrets in time of war. *See New York Times Co. v. United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971); *cf.* Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution*, N.Y. Times, Dec. 8, 2010, at A10. Exceptions to categorical rules, once created, are difficult to cabin; the logic of the new rule, like water, finds its own level, and it's hard to keep it from covering far more than anticipated. Because Judge Gould is vague about the rule he proposes, he doesn't deal with this difficulty.

Finally, Judge Gould would limit his rule to situations where the speaker and society "lack [a] substantial interest" in the untruthful statement. But how are we to tell which statements do and which ones do not have social utility? The one guiding light of our First Amend-

ment law is that government officials, and courts in particular, are not allowed to make judgments about the value of speech. Pornography is an odd exception, but it's the only one I'm aware of, and even there judgments are made on a case-by-case basis. I am aware of no context where the legislature is allowed to decide that entire categories of speech can be banned because they are socially useless. This strikes me as an awesome power to confer on government officials, one quite antithetical to the core values of the First Amendment. Judge Gould does not explain why a rule such as the one he proposes would not sound the death knell for the First Amendment as we know it.

* * *

Political and self expression lie at the very heart of the First Amendment. If the First Amendment is to mean anything at all, it must mean that people are free to speak about themselves and their country as they see fit without the heavy hand of government to keep them on the straight and narrow. The Stolen Valor Act was enacted with the noble goal of protecting the highest honors given to the men and women of our military, but the freedoms for which they fight include the freedom of speech. The ability to speak openly about yourself, your beliefs and your country is the hallmark of a free nation. Our decision not to rehear this case en banc ensures the First Amendment will retain its vitality for another day—and, hopefully, for always.

O'SCANNLAIN, Circuit Judge, joined by GOULD, BYBEE, CALLAHAN, BEA, IKUTA, and N.R. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

In this case, our court invalidates the Stolen Valor Act of 2005—a federal statute that criminalizes the act of lying about having been awarded U.S. military decorations—concluding that the Act runs afoul of the First Amendment. This is the first Court of Appeals decision to consider the constitutionality of the Act, but the court's opinion is not merely unprecedented; rather, it runs *counter* to nearly forty years of Supreme Court precedent. Over such time, the Supreme Court has steadfastly instructed that false statements of fact are not protected by the First Amendment. Because neither the court's application of strict scrutiny nor its ultimate decision accords with Supreme Court guidance, I respectfully dissent from our court's regrettable denial of rehearing en banc.

I

Shortly after winning election to a regional water district's board of directors, Xavier Alvarez stood in a public meeting and was asked to introduce himself. Before the assembled crowd, Alvarez proudly declared, "I'm a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around." *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010) (internal quotation marks omitted).

But Alvarez has never served in the Marines or in any other branch of the armed forces. He certainly has not been awarded the Medal of Honor, the nation's most

prestigious military decoration. "In short, with the exception of 'I'm still around,' his self-introduction was nothing but a series of bizarre lies." *Id.* at 1201.

The FBI obtained a recording of the board meeting and Alvarez was indicted on two counts of falsely claiming to have received the Medal of Honor, in violation of the Stolen Valor Act, 18 U.S.C. §§ 704(b), (c)(1).[1] Alvarez moved to dismiss the indictment, claiming that the Act is unconstitutional, and the district court denied the motion. *Alvarez*, 617 F.3d at 1201. He then pleaded guilty to one count of "falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor," and reserved his right to appeal the First Amendment issue. *Id.* (internal quotation marks omitted) (alterations in original).

On appeal to this court, Alvarez claimed that the Act unconstitutionally restricts the freedom of speech. The court subjected the Act to strict scrutiny review, ultimately concluding that it failed to survive. The court then rendered the first and only Court of Appeals opin-

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[1] The Act provides:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b). The penalty is enhanced if the lie involved certain enumerated medals, including the Congressional Medal of Honor. *Id.* §§ 704(c)-(d).

ion to declare the Act unconstitutional—both as applied to Alvarez and on its face. Judge Bybee dissented.

II

In giving strict scrutiny to the Stolen Valor Act, the majority ignored a straightforward aspect of First Amendment law: the right to lie is not a fundamental right under the Constitution. For nearly forty years, the Supreme Court has made this much abundantly clear. In cases concerning regulations of false speech, the Court regularly instructs that "the erroneous statement of fact is not worthy of constitutional protection." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). False statements are "particularly valueless," *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988); are "not immunized by the First Amendment right to freedom of speech," *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); "ha[ve] never been protected for [their] own sake," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); and "in and of [themselves] carr[y] no First Amendment credentials," *Herbert v. Lando*, 441 U.S. 153, 171, 99 S. Ct.1635, 60 L. Ed. 2d 115 (1979).[2]

Under plain application of the Supreme Court's guidance, the Stolen Valor Act—which criminalizes only false statements of fact—should not undergo the rigor

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[2] The Court's instruction that false speech is not constitutionally protected is but a part of the more fundamental precept of First Amendment law that certain categories of speech are fully outside of that Amendment's protections. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 & n.3, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

of strict scrutiny review. We reserve such intense scrutiny only for *constitutionally protected* speech. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986) ("[T]he government cannot limit *speech protected by the First Amendment* without bearing the burden of showing that its restriction is justified." (emphasis added)). Yet, upon the novel theory that "we presumptively protect *all* speech, including false statements," the majority erroneously subjects the Act to strict scrutiny, and in the process holds unconstitutional a plainly valid act of Congress. *Alvarez*, 617 F.3d at 1217.

A

The notion that restrictions upon false speech do not receive strict scrutiny is borne out in the Supreme Court's analysis in cases involving such speech. The Court routinely begins its review from the foundational premise that false speech "is not worthy of constitutional protection." *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997. From there, the Court assesses whether *other* speech—i.e., constitutionally protected non-false speech—demands that the particular false statements in question be protected, too. Only then must restrictions on false speech pass heightened scrutiny.

1

Closer inspection of these cases buttresses the Court's straightforward words. In *Gertz v. Robert Welch, Inc.*, for example, the Supreme Court began from the premise that "there is no constitutional value in false statements of fact." 418 U.S. at 340, 94 S. Ct. 2997. The Court went on to consider whether *other* First Amend-

ment concerns required extending a heightened "actual malice" standard to defamation actions brought by private individuals.[3] *Id.* at 340-47, 94 S. Ct. 2997. Importantly, the Court concluded that free debate does *not* require such rigorous protection of private defamation, and instead gave states the broad authority to "define for themselves the appropriate standard of liability" for such actions, so long as "they do not impose liability without fault." *Id.* at 347, 94 S. Ct. 2997. The baseline protection against strict liability was necessary, the Court explained, not because the First Amendment shields false statements as a general matter, but because such broad liability would threaten the operations of "*the press and broadcast media.*" *Id.* at 348, 94 S. Ct. 2997 (emphasis added). In other words, the Court determined that "speech that matters," *id.* at 341, 94 S. Ct. 2997—the presence of robust and functional news media—required some minimal protection against liability for publishing erroneous facts.

This same method of analysis—beginning from the presumption that false speech is unprotected and then determining whether some protection is needed for other speech that matters—has been often repeated. For example, in *Hustler Magazine v. Falwell*, the Court began by noting that "[f]alse statements of fact are particularly valueless." 485 U.S. at 52, 108 S. Ct. 876. From there, the Court considered whether the strong interest in public debate required some protection against intentional infliction of emotional distress claims

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[3] Specifically, the Court considered whether to extend the "actual malice" standard crafted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), for defamation actions brought by public officials. I discuss *Sullivan infra* Part II.A.2.

brought by public officials. *Id.* at 52-54, 108 S. Ct. 876. After an extensive analysis, the Court announced its "considered judgment" that the pivotal role played by satire in "public and political debate," *id.* at 54, 108 S. Ct. 876, required the extension of an actual malice standard to such claims. *Id.* at 56-57, 108 S. Ct. 876. *See also BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002) (considering whether the freedom to bring unsuccessful lawsuits deserves "breathing space protection" under the First Amendment).

Our own court has followed the same pattern of analysis. Under the Supreme Court's guidance, we recognize that "false statements are not deserving, in themselves, of constitutional protection," and thus "constitutional protection is afforded [only] *some* false statements." *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 424 (9th Cir. 1995) (emphasis added). Namely, we must consider "the interest in creating a 'breathing space'" for constitutionally protected speech. *Id.*

For example, in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, we began by recognizing that the "[F]irst [A]mendment has not been interpreted to preclude liability for false statements." 690 F.2d 1240, 1261 (9th Cir. 1982). From there, we asked whether allowing antitrust liability for furnishing false information to an administrative body would impinge on other, constitutionally protected speech. Ultimately, we concluded that imposing such liability would not "hamper debate," and therefore that no heightened First Amendment protections applied. *See id.* at 1261-62. Moreover, we made clear that even where a restriction on false statements *will* hamper debate, "this possibility

does not require that all such statements be immunized from liability." *Id.* at 1262. Indeed, the protection of speech that matters may simply "suggest that a court should adopt a stricter standard of proof," not even that the most exacting level of scrutiny should be applied. *Id.*

2

In this case, the majority implied that the Supreme Court's long line of decisions applying the foregoing analysis is called into question by its earlier decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). *See Alvarez*, 617 F.3d at 1203, 1206-08. Nothing could be further from the truth. *Sullivan* does not suggest that false statements, in and of themselves, receive constitutional protection. Quite the opposite, in *Sullivan* the Court engaged in precisely the analysis described above.

In *Sullivan*, the Court considered whether an elected commissioner of Montgomery, Alabama could bring a civil libel suit for defamatory comments contained in a full-page political advertisement. *Id.* at 256-57, 84 S. Ct. 710. Of the advertisement's ten paragraphs, only two contained statements that were allegedly false. *Id.* at 257, 84 S. Ct. 710. Rather than addressing whether false speech, as a category, is protected by the First Amendment, the Court asked whether the "*advertisement*, as an expression of grievance and protest on one of the major public issues of our time, . . . forfeits [First Amendment] protection by the falsity of *some of its factual statements*." *Id.* at 271, 84 S. Ct. 710 (emphasis added). Ultimately, the Court concluded that the presence of some erroneous statements did not forfeit all

protections for the political advertisement as a whole. Because "erroneous statement is inevitable in free debate," in certain circumstances, it "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id.* at 271-72, 84 S. Ct. 710 (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)) (ellipsis in original). The Court noted that this is especially true in the unique "climate in which public officials operate." *Id.* at 273 n.14, 84 S. Ct. 710. Accordingly, the Court required a heightened "actual malice" scienter for public officials seeking to bring defamation actions against their critics, specifically to buttress our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270, 84 S. Ct. 710.

As described by the Supreme Court itself, *Sullivan* thus stands for the simple proposition that we must "protect *some falsehood* in order to protect *speech that matters*." *Gertz*, 418 U.S. at 341, 94 S. Ct. 2997 (emphasis added) (discussing *Sullivan*). This is a far cry from the majority's opinion, which somehow concludes that "we presumptively protect all speech, including false statements." *Alvarez*, 617 F.3d at 1217 (emphasis omitted). The Court in *Sullivan* did not address the question whether false statements, as a category, are protected by the First Amendment.[4] *Sullivan*'s holding does not

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[4] And the Court certainly did not address whether *all* speech is presumptively protected, as the majority opinion states. It is difficult to see how the majority could defend this more startling conclusion, given the multitude of Supreme Court cases stating emphatically that certain "categories of speech [are] *fully outside* the protection of the First Amendment." *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577,

even apply to defamation actions against private individuals, nor does it extend First Amendment protections to *any* knowingly false speech, *see Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.").

Sullivan is but one example of granting limited First Amendment protection to false statements *in order to* protect other, non-false speech that matters. *See BE & K Constr. Co.*, 536 U.S. at 531, 122 S. Ct. 2390 (describing *Sullivan* as "[a]n example of . . . 'breathing space' protection" for speech that matters). And *Sullivan* therefore does not establish any rule that calls into question the Court's many subsequent statements that identify false speech as constitutionally unprotected.

B

Altogether, upon consideration of both the Supreme Court's plain statements and the Court's underlying analysis, we are left with the conclusion that false statements of fact are not protected by the First Amendment, *unless it is shown* that other "speech that matters" requires such protection. Without more, restrictions upon false statements, as with other areas of unprotected speech, are simply not subject to strict scrutiny review. *See United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 1585-86, 176 L. Ed. 2d 435 (2010) ("[W]ithin [the] categories of unprotected speech . . . no process of case-by-case adjudication is required, because the balance of competing interests is clearly

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1586, 176 L. Ed. 2d 435 (2010) (emphasis added); *accord Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

struck." (internal quotation marks omitted)). The majority never should have imposed such exacting standards upon the Stolen Valor Act.

III

Despite such overwhelming precedent, the majority somehow proclaims to "find *no authority* holding that false factual speech, as a general category unto itself, is [unprotected by the First Amendment]." *Alvarez*, 617 F.3d at 1206 (emphasis added). With that remarkable conclusion, the majority dove into strict scrutiny analysis after determining that the government had not rebutted the majority's self-imposed presumption of such scrutiny. The court never even considered whether the Stolen Valor Act will chill speech that matters, much less required Xavier Alvarez to demonstrate that it will.[5]

In so doing, the majority both rejected the Supreme Court's settled method of analysis and ignored the Court's clear language. As Judge Bybee put it, "[t]he majority . . . effectively overruled *Gertz* and inverted the whole scheme." *Id.* at 1223 (Bybee, J., dissenting). And, ultimately, the majority imposed burdens upon the

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[5] In his post-opinion concurrence, Judge Smith insists that the government is required "to prove that the targeted speech is not . . . protected." Smith Concurrence at 668. This is misleading. At most, the government bears the burden of showing that the speech targeted is *within a certain class* of unprotected speech; once that is shown, no further case-by-case analysis is needed, *see Stevens*, 130 S. Ct. at 1585-86. Here, there is no question that the Act criminalizes *only* false statements of fact. Such statements are categorically unprotected for their own sake—and it is then Alvarez's burden to demonstrate whether other First Amendment concerns require protection of the false statements at issue.

Stolen Valor Act that are unsupported by, and are even directly contrary to, existing law.

A

1

Instead of recognizing that false speech is unprotected, the majority refused to give the Supreme Court's consistent and overwhelming precedent its full due. Instead, the majority "believe[s] the historical category of unprotected speech identified in *Gertz* and related law is *defamation*, not all false factual speech." *Alvarez*, 617 F.3d at 1207 (emphasis added). The majority thus analyzed the issue as whether it should "extend" this traditionally unprotected category of "defamation" to include false statements of fact more broadly. *Id.* at 1208.

But to accept the majority's reading of *Gertz* and its progeny, one must turn a deaf ear to the Supreme Court's language. Indeed, in the majority's view, each of the myriad times the Court referred to "false statements" generally, the Court misspoke. For instance, when the Court wrote that "the erroneous statement of fact is not worthy of constitutional protection," *Gertz*, 418 U.S. at 340, 418 U.S. 323, what it really meant (according to the majority) was "the erroneous statement of fact is not worthy of constitutional protection [only if it meets the traditional definition of defamation]." Or when the Court instructed that "false statements [are] unprotected for their own sake," *BE & K Constr. Co.*, 536 U.S. at 531, 122 S. Ct. 2390, it actually meant (according to the majority) that "[slander and libel are] unprotected for their own sake."

It is not our place to put words into the mouth of the Supreme Court. Worse yet, it is not our place to take

the Supreme Court's actual words and reshape them to mean something entirely different. As Judge Bybee noted in dissent, the Supreme Court surely knows the difference between "defamation" and "false statements of fact." *See Alvarez*, 617 F.3d at 1223 (Bybee, J., dissenting). If it meant the former, presumably it would have said so. I cannot assume that the Court would have blithely used "false statements" to mean "defamation" for four decades running.

2

In reaching its constrained reading of *Gertz* and its progeny, the majority relies heavily on the Supreme Court's recent decision in *United States v. Stevens*. There, the Court considered whether graphic portrayals of violence to animals are entitled to protection under the First Amendment. Outlining the general framework for considering First Amendment challenges, the Court explained that certain "categories of speech [are] fully outside the protection of the First Amendment." *Stevens*, 130 S. Ct. at 1586. By way of illustration, the Court noted that these categories "includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Id.* at 1584 (citations omitted). The Court went on to reject the contention that depictions of animal cruelty were one such category, and thereafter to reject the argument that a new category for such depictions should be created.

The majority makes much of the fact that the Court in *Stevens* did not specifically name "false statements of fact" in its list of historically unprotected categories of speech. *See Alvarez*, 617 F.3d at 1208-09. The majority reads into that passage an implication that false state-

ments are *not* historically unprotected. But, by its own terms, the Court's list of unprotected categories is not exhaustive. Even more, by stating that the categories of historically unprotected speech *include* the examples it named, the Court implied that other, unnamed classes of speech are unprotected as well. *See Burgess v. United States*, 553 U.S. 124, 131 n.3, 128 S. Ct. 1572, 170 L. Ed. 2d 478 (2008) ("'[T]he word 'includes' is *usually a term of enlargement*, and not of limitation.'" (emphasis added) (quoting 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47:7, at 305 (7th ed. 2007))). It is obvious that the Supreme Court's brief, illustrative list was in no way intended to call into question its decades of precedent explicitly stating that false statements of fact do not receive First Amendment protection.

Moreover, it is little surprise that the Supreme Court at times refers specifically to "defamation" as an unprotected category, given that many of the cases in this area concern defamatory statements.[6] *See, e.g., Gertz*, 418 U.S. at 323, 94 S. Ct. 2997; *Chaplinsky*, 315 U.S. at 568, 62 S. Ct. 766. But the Court's reference to the specific category of defamation in a given case has never been thought to refute the notion that the general category of false statements is unprotected. For example, in *Chaplinsky v. New Hampshire*, the Court listed the categories of historically unprotected speech as "the lewd and obscene, the profane, the *libelous*, and the insulting

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[6] Importantly, not *all* of the cases in this area deal with defamation—a point that cuts sharply against the majority's reading of *Gertz*. *See, e.g., BE & K Constr. Co.*, 536 U.S. 516, 122 S. Ct. 2390 (retaliatory lawsuits); *Hustler Magazine*, 485 U.S. 46, 108 S. Ct. 876 (intentional infliction of emotional distress); *see also Alvarez*, 617 F.3d at 1224-27 (Bybee, J., dissenting) (collecting and discussing cases).

or 'fighting' words." *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. 766 (emphasis added). But, directly quoting *Chaplinsky*, in *Gertz* the Court stated more broadly that "false statements of fact" are categorically unprotected. *Gertz*, 418 U.S. at 340, 94 S. Ct. 2997. The fact that one of the Court's most recent statements on unprotected categories of speech did not expressly mention "false statements of fact" sheds little, if any, light on the historical protection of such speech.

B

After dodging the Supreme Court's clear guidance, the majority mistakenly concludes that the only way for the Stolen Valor Act to survive is if it requires a scienter above negligence and a showing of individualized harm. *See Alvarez*, 617 F.3d at 1207-14. According to the majority, these requirements are derived from those imposed upon regulations of defamation and fraud—the two categories of unprotected speech that the majority admits deal in false statements. But upon closer look at current laws, the majority's self-created requirements do not hold water. Moreover, even if we *were* to impose such requirements, the Stolen Valor Act still survives.

1

The litany of state and federal laws that prohibit false speech *without* a showing of individualized harm drastically undermine the majority's insistence that all regulations of false speech must require such a showing.[7] For example, Chapter 47 of Title 18 (named

[7] Moreover, the failure of these laws to comply with the majority's self-created requirements suggests that prohibitions of false speech have not been constrained to traditional definitions of "fraud" or "def-

"Fraud and False Statements"), criminalizes a host of false statements, including many without any showing of harm (or even of "materiality")—and some which do not even contain a scienter requirement. *See, e.g.*, 18 U.S.C. § 1005 (punishing "any false entry in any book, report, or statement" of a bank); *id.* § 1011 (punishing "any [knowingly] false statement . . . relating to the sale of any mortgage, to any Federal land bank"); *id.* § 1015(a) (punishing "any [knowingly] false statement under oath, in any case, proceeding, or matter relating to . . . naturalization, citizenship, or registry of aliens"); *id.* § 1027 (punishing "any [knowingly] false statement or representation of fact . . . required by [ERISA]"). The Supreme Court has rejected the contention that these statutes implicitly require a showing of materiality or harm—and yet the Court did not even consider whether the absence of such a requirement raised First Amendment concerns. *See United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997). And the federal government is far from alone; a quick survey of but a few states within our own circuit underscores just how prevalent prohibitions of false statements are, even without individual harm requirements. *See, e.g.*, Alaska Stat. § 11.56.800(a)(2) (punishing "false report[s] to a peace office that a crime has occurred or is about to occur"); Ariz. Rev. Stat. § 13-2907.03 (punishing a knowingly "false report of sexual assault involving a spouse"); Nev. Rev. Stat. § 199.145 (punishing any willful "unqualified statement of that which the person does not know to be true" made under oath); Rev. Code Wash. § 9A.60.070 (punishing knowingly false claims of "a cre-

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amation." I certainly do not agree, as Judge Smith assumes, Smith Concurrence at 670, that these laws are constitutional only because they fit within such categories as listed in *Stevens*.

dential issued by an institution of higher education that is accredited," in promotion of a business or with the intent to obtain employment).

It is thus neither out of the ordinary nor constitutionally significant that the Stolen Valor Act does not require a showing of individualized harm.

2

Even if we were to require the Stolen Valor Act to contain the majority's self-created requirements, the Act would still stand. First, even accepting the need for some scienter above negligence, it is clearly met here.[8] Although the Act does not explicitly contain a scienter requirement, Alvarez readily admits that he knew his statement was a lie when he uttered it. *See Alvarez*, 617 F.3d at 1201. Thus, at least as-applied to Alvarez, the statute's lack of a scienter requirement is of no moment. Moreover, in seemingly every case that would be prosecuted under the Act, the speaker will know the falsity of his statement. It is difficult to imagine a scenario in which a speaker honestly believes that he has been awarded a military honor that he has not actually received. To the extent that any such case would arise, it surely would be the rare exception. Thus, the lack of a scienter requirement carries no weight even under Alvarez's facial challenge. That challenge may succeed only if "no set of circumstances exists under which the

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[8] Although the majority implied that, to survive, the Act must require a "malicious" or "knowingly false" scienter along the lines of *Sullivan*, *Alvarez*, 617 F.3d at 1209, it is difficult to understand why such a strict scienter would be required here, while it is not even required in defamation actions brought by non-public figures, *see Gertz*, 418 U.S. at 343-50, 94 S. Ct. 2997.

Act would be valid."[9] *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

Second, even if it were necessary, a requirement that the Act criminalize only statements that effect some harm is easily satisfied. Indeed, Congress has identified the harm at issue: "[f]raudulent claims surrounding the receipt of . . . [military] decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266 (2006). The majority admits that "Congress certainly has an interest, even a compelling interest" in preventing such harm. *Alvarez*, 617 F.3d at 1216. That the Act does not explicitly limit its scope only to those false statements that incur this congressionally identified harm is inconsequential; the underlying point is that *all* such statements contribute to the harm. *See also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) ("False statements of fact harm both the subject of the falsehood and the readers of the statement." (emphasis removed)). "The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

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[9] Similarly, the Act's lack of a scienter requirement does not render the statute overbroad, which would require its unconstitutional sweep to be "*substantial* . . . [when] judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (emphasis added).

It is difficult to see how reputational harm to the military even could be evaluated on an individual basis, and it is no surprise that the Act has not made such a showing an element of the offense. The Act's general harm provision is both sensible and sufficient. Neither the Constitution nor the Supreme Court has required anything more specific.[10]

IV

Finally, how should one address the bleak dystopia hypothesized by Chief Judge Kozinski? In his view, if we are to take the Supreme Court at its word that false statements of fact are unprotected by the First Amendment, then a variety of white lies, exaggerations, and cosmetic enhancements—and apparently the core of self-expression itself—must fall. See Kozinski Concurrence at 673-75. Such fears are wholly unfounded and miss the very crux of my disagreement with the majority.

As an initial matter, most of the "lies" that Chief Judge Kozinski postulates are not false statements of fact whatsoever. They are opinions ("Gee you've gotten skinny;" "She's just a friend;" "I just haven't met the right woman;" "I'm sooo lucky to have a smart boss like you;" "I had too much to drink;" "You're the greatest

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[10] Indeed, 18 U.S.C. § 1001—the leading federal prohibition on false statements—was vastly expanded following the New Deal, out of Congress's recognition that certain false statements would impair government functioning "*even though* the government would not be deprived of any property or money." *Brogan v. United States*, 522 U.S. 398, 412, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998) (Ginsburg, J., concurring) (emphasis added). This, like the Stolen Valor Act, is but one example of Congress's authority to prohibit false speech based upon general, perhaps unprovable, assumptions about public good.

living jurist"); expressions of emotion or sensation ("I love opera;" "But I love you *so* much;" "It's not you, it's me;" "My back hurts;" "I've got a headache"); predictions or plans ("[I]t won't hurt a bit;" "I'll call you about lunch"); exaggerations ("We go way back"); and playful fancy ("There are eight tiny reindeer on the rooftop"). Kozinski Concurrence at 673, 674-75. Even if these were to be described—under the loosest possible definition—as statements of fact, they would hardly be falsifiable. Such statements thus are not even implicated by the foregoing discussion of the protections afforded false statements of fact. *See generally Alvarez*, 617 F.3d at 1220-23 (Bybee, J., dissenting) (outlining the contours of false statements, as defined by the Supreme Court).

More importantly, Chief Judge Kozinski appears to have misunderstood my fundamental disagreement with the majority. That false statements of fact are always *unprotected* in themselves is not to say that such statements are always *subject to prohibition*. Quite to the contrary, as I have discussed at length, false statements may often *not* be prohibited, where it is shown that other, constitutionally protected speech will be stifled as well. For example, Chief Judge Kozinski identifies "[p]olitical and self expression" as "at the very heart of the First Amendment." Kozinski Concurrence at 677. And false statements could not uniformly be prohibited without regard to the effect on such forms of expression. But the problem here—and the reason that this case deserves to be reheard en banc—is that the majority never even *asked* whether speech such as political or

self-expression would be harmed by the Stolen Valor Act before diving into strict scrutiny analysis.[11]

Like a Hollywood horror film, Chief Judge Kozinski describes a fictional world that may frighten, but which is far removed from the one in which we actually live.

V

Because the majority has strayed from the Supreme Court's clear guidance—and in the process has taken this court's First Amendment jurisprudence along for the ride—I must respectfully dissent from our court's regrettable failure to rehear this case en banc.

GOULD, Circuit Judge, dissenting from denial of rehearing en banc:

I respectfully dissent from denial of rehearing en banc. Although I agree with the suggestions of Judge O'Scannlain and Judge Bybee in their respective dissents that the majority in *Alvarez* is in tension with Supreme Court holdings in *Gertz* and *Garrison*, I would emphasize a different approach in my preferred form of analysis. I do not feel that sustaining Congress's Stolen

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[11] Judge Smith now suggests that the need to protect "speech that matters" is an illusory restraint on the government. *See* Smith Concurrence at 673 (questioning what sorts of speech "matter" and suggesting that lies would be subject to "ever-expanding" prohibition). But, as has been discussed, the Supreme Court has indeed restricted the prohibition of some false statements in the interest of political expression and public debate. *See supra* Part II.A. Judge Kozinski's "Kafkaesque world," Smith Concurrence at 673, suggests that personal self-expression may require similar protection in some cases. In short, there are many areas of speech that matter which may require protection in a given case, but the court must actually *address* such areas in order to give the safeguard teeth.

Valor Act turns on the scope of a sentence from the Supreme Court in any one particular case, whether *Gertz*, or *Garrison*, or *Stevens*. Nor does it require that we say that all false statements are not deserving of First Amendment protection. Rather, I stress that the military context, in which the power of Congress is necessarily strong, together with the lack of any societal utility in tolerating false statements of military valor such as those made by Alvarez, which steal or dilute significant honors bestowed on military heroes, counsel that it's improper to apply strict scrutiny to invalidate this law on its face.

I do not doubt that some statements of the Supreme Court in other cases, read by the *Alvarez* majority to apply here, have contributed to the majority's reasoning. That is, of course, the common law method, and even dicta from the Supreme Court warrants respect. *See, e.g.*, *Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004) (stating that Supreme Court dicta is entitled to "great weight"); *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 561 (3d Cir. 2003) (en banc) ("Although . . . the Supreme Court's dicta are not binding on us, we do not view it lightly."). But here, both sides to the controversy can find sentences in prior opinions to use in aid of their theories of the case. Moreover, statements in prior opinions, regardless of potential utility in a current dispute, cannot properly be interpreted as absolutely binding in cases involving different types of facts not present in a previous case decided by the Supreme Court.

It remains open for the Supreme Court to clarify its First Amendment law in the context of Alvarez's chal-

lenge to the Stolen Valor Act. For my part, I would distinguish cases with language cutting a different way, while viewing the crux of the issue as this: A rational Congress might think that the quality of military service and instances of award winning heroism will be enhanced to the extent that there aren't false claims of entitlement to military honors. This interest is a powerful one that a federal court should hesitate to diminish by outlawing the controlling statute on its face. Conversely, Alvarez has no substantial personal interest in lying about his military record, nor is there any substantial societal interest served by letting Alvarez lie about earning awards that he did not receive. I would hold that Congress's criminalization of making false statements about receiving military honors is a "carefully defined" subset of false factual statements not meriting constitutional protection. *See United States v. Alvarez*, 617 F.3d 1198, 1213 (9th Cir. 2010). Stated another way, there should be no conclusion of unconstitutionality even on the standard framed by the majority opinion. To uphold this statute would not necessarily remove all false statements in all contexts from First Amendment scrutiny.

The interests of society at stake counsel us to apply a more permissive standard than the compelling state interest test when assessing the Stolen Valor Act and to uphold it in whole or part if possible. It would be too much to say that any speech by any person about military affairs would fall outside the First Amendment's purview, for that inescapably would lead us to approve sedition acts and criminal prosecutions of those who criticize wars or military conduct. However, Alvarez was not criticizing actions of the military, he was just lying about his military history. Given the military context

impelling Congress and the lack of substantial interest of Alvarez or society in his falsehood, the Stolen Valor Act should be sustained against Alvarez's First Amendment challenge. We could leave for another day whether an as applied challenge might be permissible on other facts.

Hence I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.: CR 07-1035(A)-RGK Date: Apr. 9, 2008

Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT COURT JUDGE

Interpreter N/A

Sharon L. Williams	Not Reported	Craig Missakian, Not Present
Deputy Clerk	*Court Reporter/ Recorder, Tape No.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond
Xavier Alverez	N		X

Attorneys for Defendants:	Present	App.	Ret.
Brianna Fuller, DFPD	N	X	

Proceedings: (IN CHAMBERS) ORDER DENYING DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

On July 23, 2007, Defendant Xavier Alvarez ("Alvarez" or "Defendant") falsely claimed to have received the Congressional Medal of Honor. Defendant made the statement while introducing himself to the Walnut Valley Water District Board as a newly elected director. According to a digital recording of the meeting, he stated, among other things: "I'm a retired Marine of 25 years. I retired in the year 2001. Back in

1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around." (See Ex. B.)

On September 26, 2007, Defendant was indicted for violating 18 U.S.C. § 704(b), also known as the Stolen Valor Act of 2005, which makes it a crime to falsely claim receipt of military decorations or medals. Defendant now brings a Motion to Dismiss the Indictment against him, claiming that the statute violates his First Amendment right to free speech.

II. JUDICIAL STANDARD

Defendant uses the label "Motion to Dismiss Indictment" for its present filing. Such a motion relates specifically to dismissal of a grand jury indictment on procedural grounds, which Defendant does not seek. Rather, it appears that Defendant intended to file his motion under Fed. R. Crim. Proc. 12(b)(2), which allows defendants to challenge the substantive basis for the charges against them.

Similar to Fed. R. Civ. Proc. 12(b)(2), in considering a motion to dismiss under Fed. R. Crim. Proc. 12(b)(2), the court must assume the plaintiff's allegations are true, and must construe the complaint in the light most favorable to the plaintiff. *See United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir. 1981). However, in this case Defendant brings a constitutional challenge to the underlying law upon which he is being prosecuted. Therefore, the Court examines the validity of his arguments in the light most favorable to upholding the constitutionality of the law. *See Gray v. First Winthrop Corporation*, 989 F.2d 1564 (9th Cir. 1993).

III. DISCUSSION

Defendant contends that the Stolen Valor Act of 2005 violates his First Amendment right to free speech, and is unconstitutional both facially and as applied in this case. Specifically, he argues that his statement, though false, was political in nature, and thus protected under the First Amendment. For the reasons set forth below, the Court disagrees.

Defendant cites several cases in support of his assertion that his false statement about having been awarded the Congressional Medal of Honor is protected speech under the First Amendment. These cases can generally be divided into two categories. First, Defendant cites cases that address defendants who make defamatory statements against others. *Gertz v. Welsh*, 418 U.S. 323 (1974) (Defendant's article about the plaintiff negligently accuses him of being a Communist); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (advertisement published by the New York Times negligently misrepresents that Montgomery, Alabama police officers took wrongful action against civil rights protesters). The second line of cases cited by Defendant address content- and/or viewpoint-based regulations. *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530 (1980) (upholding the distribution of pamphlets on matters of public policy by utility companies); *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334 (1995) (concerning the distribution of leaflets expressing political views of members of the public); and *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the defendant's act of flag burning, during a political demonstration, was protected speech under the First Amendment). These cases are all inapposite, as here Defen-

dant's false statement was made knowingly and intentionally, and not negligently; nor does Defendant claim that his statement about having received the Congressional Medal of Honor expressed a political message or viewpoint.

Garrison v. State of Louisiana is better authority. 379 U.S. 64 (1964). In *Garrison*, a District Attorney made defamatory statements about state court judges at a press conference, in violation of a Louisiana criminal defamation statute. *Id.* at 64-66. In its ruling, the U.S. Supreme Court expressly held that false statements made knowingly and intentionally are not protected under the First Amendment, even when political in nature:

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Id. at 75; *see also Pestrak v. Ohio Elections Com'n*, 926 F.2d 573 (6th Cir. 1991) (upholding a statute prohibiting false statements during a campaign because "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth."). Here, as in *Garrison*, there is no dispute that Defendant made his false statement knowingly and intentionally. Thus, this statement is not protected by the First Amendment.

As *Garrison* makes clear, the mere classification of speech as "political" does not afford a defendant First Amendment protections. However, even if the analysis turned on whether the speech at issue was political, the Court finds that Defendant's statement was not political in nature. Where there is no threat to free and robust debate of public issues, no potential interference with a meaningful dialogue of ideas concerning self-government, and no threat of liability causing a reaction of self-censorship by the press, the First Amendment protection of matters of public concern is not implicated. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985), *quoting Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 366 (1977).

Here, this Court is presented with a false statement of fact, made knowingly and intentionally by Defendant at a Municipal Water District Board meeting. The content of the speech itself does not portray a political message, nor does it deal with a matter of public debate. Rather, it appears to be merely a lie intended to impress others present at the meeting. Such lies are not protected by the Constitution.

As Defendant's statement does not merit the protection of the First Amendment, the statute under which Defendant is being prosecuted, 18 U.S.C. § 704, cannot be deemed unconstitutional as applied in this case. Furthermore, a legislative act is facially unconstitutional only when no set of circumstances exist under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). In finding that the application of 18 U.S.C. § 704 is not unconstitutional as applied here,

this Court therefore concludes that the Act is not unconstitutional on its face.[1]

IV. CONCLUSION

In light of the foregoing, the Court **DENIES** Defendant's Motion to Dismiss.

IT IS SO ORDERED.

_____ : _____

Initials of Deputy Clerk slw

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[1] Moreover, the Court finds no basis for otherwise declaring the statute unconstitutional on its face. The statute is narrowly written to proscribe deliberate false statements concerning a very specific subject matter: the receipt of military decorations or medals. As such, the statute does not suppress legitimate political speech. Moreover, the statute does not risk chilling public discourse. Whether one actually received a military award is easily verifiable and not subject to multiple interpretations; thus, there is no danger that the statute will discourage truthful statements about military service or any other matters.

APPENDIX D

18 U.S.C. 704 provides:

Military medals or decorations

(a) IN GENERAL.—Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barters, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

(c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.—

(1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

(2) CONGRESSIONAL MEDAL OF HONOR DEFINED.—In this subsection, the term "Congressional Medal of Honor" means—

(A) a medal of honor awarded under section 3741, 6241, or 8741 of title 10 or section 491 of title 14;

(B) a duplicate medal of honor issued under section 3754, 6256, or 8754 of title 10 or section 504 of title 14; or

(C) a replacement of a medal of honor provided under section 3747, 6253, or 8747 of title 10 or section 501 of title 14.

(d) ENHANCED PENALTY FOR OFFENSES INVOLVING CERTAIN OTHER MEDALS.—If a decoration or medal involved in an offense described in subsection (a) or (b) is a distinguished-service cross awarded under section 3742 of title 10, a Navy cross awarded under section 6242 of title 10, an Air Force cross awarded under section 8742 of section 10, a silver star awarded under section 3746, 6244, or 8746 of title 10, a Purple Heart awarded under section 1129 of title 10, or any replacement or duplicate medal for such medal as authorized by law, in lieu of the punishment provided in the applicable

subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

OPPOSITION BRIEF

No. 11-210

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

- v. -

XAVIER ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Stolen Valor Act of 2005, codified at 18 U.S.C. § 704(b), which makes it a crime to falsely claim to have received the Congressional Medal of Honor (and other service medals) verbally or in writing, is unconstitutional on its face, or as applied to Xavier Alvarez, a political office holder, because it violates the Free Speech Clause of the First Amendment to the Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 11-210

UNITED STATES OF AMERICA,
Petitioner,

- v. -

XAVIER ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Xavier Alvarez respectfully requests that this Court deny the petition for a writ of certiorari. This case represents the first challenge to the constitutionality of the Stolen Valor Act, and the identical issue is currently pending in four different circuits. The passage of time and opportunity for further percolation in the lower courts will no doubt allow the Court to determine whether a split will develop, and assist the Court in assessing the far-reaching consequences that a decision in this case might have on application of the Free Speech Clause and on criminal prosecutions throughout the country. Moreover, the court of appeals' decision is nothing more than a straightforward application of this Court's precedents and strict scrutiny analysis to the content-based restriction on speech enshrined in the Act. Review by this Court is therefore unnecessary.

STATEMENT

In the Stolen Valor Act of 2005, Congress made it a misdemeanor offense to "falsely represent . . . verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." 18 U.S.C. § 704(b). An additional penalty attaches to false claims of particular military decorations, including the Medal of Honor. *Id.* § 704(c)-(d).[1] The findings that accompanied the law state that "[f]raudulent claims surrounding the receipt of the Medal of Honor [and other military decorations] damage the reputation and meaning of such decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266.

The bill was signed into law on December 20, 2006. *Id.* In the nearly five years since the law went into force, prosecutions under section 704(b) have averaged less than ten filings per year, accounting for less than 0.0001% of federal prosecutions.[2]

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[1]Petitioner dedicates much of its petition for certiorari to establishing that the military has long used military decorations to foster esprit de corps and that it continues to believe awards are important to that end. Respondent does not contend otherwise. As Judge M. Smith noted, concurring in the denial of rehearing en banc, "the majority opinion does not impugn the reputation of any of our brave men and women in uniform. On the contrary. The strict scrutiny analysis of the majority opinion affirms that our men and women in uniform put themselves in harm's way because they are honorable and brave, and not because they seek to be awarded one or more of the medals covered by the Act." (App. 94a-95a).

[2]Respondent does not have access to Department of Justice databases, but has tried to be inclusive: Respondent has reviewed all Section 704 prosecutions reported in the Transactional Records Access Clearinghouse ("TRAC"), which compiles statistics about federal prosecutions, as well as all prosecutions reported in

One of the first individuals charged under the Stolen Valor Act was Xavier Alvarez. Alvarez was an elected member of the Board of Directors of the Three Valleys Municipal Water District in Pomona, California. (App. 4a).[3] On July 23, 2007, at a public water board meeting, Alvarez was asked to introduce himself. He stated that he was a retired Marine of 25 years, that he had been awarded the Congressional Medal of Honor, and that he had been wounded many times. (App. 4a). In fact, Alvarez had never served in the military. (App. 4a).

Alvarez's statement harmed no one, and there was no evidence that his "series of bizarre lies" helped him obtain any tangible or intangible benefits, or that anyone detrimentally relied on his false statement. (App. 4a, 29a, 94a). But the repercussions from the statement were swift: Alvarez was immediately perceived as a phony, even before the FBI began investigating him. (App. 26a). Almost immediately after Alvarez made his claim, a recording of the meeting was forwarded to the FBI for investigation. (App. 5a). In September 2007, Alvarez was indicted on one count of violating the Stolen Valor Act. (App. 5a). Even as his case was proceeding through the trial court, he was pilloried in the community and in

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United States Attorney's Offices press releases or on the websites that track the Stolen Valor Act. Respondent has included in this number any prosecution reported in the above sources that included a Section 704(b) charge, or where it was not clear whether the individual was charged under Section 704(b) or 704(a). Respondent located 45 cases over the five-year period that met that definition. TRAC reports that the yearly total of federal prosecutions, for the last five years, ranges from 117,651 to 165,346.

[3]The opinion inadvertently indicates that Alvarez won a seat on the Board in 2007; in fact, he was elected to the Board on November 7, 2006.

the press, labeled an "idiot," "jerk," and worse. (App. 26a).

In the district court, Alvarez filed a motion to dismiss the indictment, in which he raised both a facial and an as-applied challenge to the constitutionality of the Stolen Valor Act. (App. 140a). The district court denied the motion. (App. 141a-144a). It held that *Garrison v. Louisiana*, 379 U.S. 64, 64-66 (1964), rendered knowing false statements of fact entirely unprotected by the First Amendment. (App. 142a). The court added that it saw no other basis for a facial challenge; the statute is "narrowly written to proscribe deliberate false statements concerning a very specific subject matter," and "does not suppress legitimate political speech . . . [or] risk chilling public discourse." (App. 144a).

The Ninth Circuit reversed. It started from the principle that content-based restrictions on speech are generally subjected to strict scrutiny. (App. 7a). The Court then dispensed with the government's and dissent's starting premise that false statements of fact are valueless. (App. 10a-11a). The Court held that, while false statements of fact may not be protected for their own benefit, "the right to speak and write whatever one chooses . . . without cowering in fear of a powerful government is . . . an essential component of the protection afforded by the First Amendment." (App. 14a). To take the dissent's perspective would be to "turn[] customary First Amendment analysis on its head," because "'[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.'" (App. 10a-11a, 13a [quoting *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010)]).

Thus, only "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems" are excepted from strict scrutiny. (App. 7a [quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)]). The ""historic and traditional categories long familiar to the bar[ ]" includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. . . ." (App. 7a [quoting *Stevens*, 130 S. Ct. at 1584 (internal citations omitted in original, alterations in original)]).

After reviewing *Stevens*' categories, the Court determined that false factual speech was not among the historically-unprotected categories, nor could the statements at issue be squeezed into any of the existing categories of unprotected speech. As to the first question, the Court recognized that the Supreme Court had sometimes made broad pronouncements declaring false statements to be unworthy of protection in their own right. (App. 16a). At the same time, in order to provide the proper breathing space for the First Amendment, the Court had always placed boundaries about what kind of false speech can be prohibited. (App. 17a-19a). In the past, the Court had upheld limitations on false factual speech, but only in circumstances where the statement was made knowingly and caused some harm. (App.13a-19a). The *Stevens* Court confirmed this understanding when it included defamation on its list of historically unprotected categories of speech, rather than false statements of fact generally. (App. 19a).

As to the second question, the Court concluded that the Stolen Valor Act did

not fall under *Stevens*' defamation category, because it lacked two hallmarks of defamation – a knowledge or intent requirement, and a requirement of harm. (App. 22a-23a). While the Court was willing to read a scienter requirement into the statute, this would not cure the absence of a requirement of harm. (App. 22a-23a). Moreover, while defamation safeguards the strong interest in protecting individuals from injury to their reputation, it is far from clear that the government can use defamation law to restrict speech "as a means of self-preservation," or, in other words, where the only value threatened is the reputation of some government institution or symbol. (App. 24a). For similar reasons, the Stolen Valor Act is not sufficiently akin to perjury or fraud to warrant protection under those categories. (App. 27a-28a).

Because false statements of fact are not historically unprotected, the Court concluded that strict scrutiny applied. (App. 35a). And, as even the dissent had conceded, the Act did not satisfy that standard. (App. 36a). While the end was legitimate, even "noble," a criminal sanction is not a narrowly tailored means; there is no evidence false claims actually affect the integrity of the medals, and the remedy is more speech, or an act that actually targets fraud. (App. 38a-39a).

Judge Bybee dissented, charging the majority with "turn[ing] the exceptions into the rule and the rule into an exception." (App. 44a). In the dissent's view, the starting place for analysis is that false statements of fact are valueless in the constitutional calculus, and therefore should be protected only to the extent necessary to protect speech "that matters." (App. 42a). In that category, the dissent

would place satire, fiction, and rhetorical hyperbole. (App. 49a). The dissent grounded its argument in broad statements in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and other cases to the effect that false statements of fact have no constitutional value. (App. 45a). The dissent concluded that the *Stevens* Court's use of the term defamation, instead of false statements, was "nothing interesting," because most of the cases in the category of false statements of fact arose in the defamation context and because the Court had used both terms to describe speech within the unprotected category. (App. 56a). Using that construct, the dissent concluded that the Stolen Valor Act was constitutional because it would not suppress speech that "mattered." (App. 69a, 76a).

Rehearing en banc was sought, but denied. (App. 91a-92a). Judge M. Smith authored a concurrence from denial of rehearing, joined by Chief Judge Kozinski, in which he reiterated that the Supreme Court had upheld limitations on false statement of fact only where such limitations required a culpable state of mind and caused injury. (App. 99a). Such nuance, it concluded, would have been unnecessary if false factual speech was simply unprotected. (App. 99a). Not only did *Stevens*' categories of unprotected speech not include "false statements of fact," but six decades of such formulations had consistently omitted the dissent's proposed classification from the list of unprotected categories. (App. 100a). And, "as Judge O'Scannlain's Dissent appears to acknowledge, *all* of the cases and statutes [the dissent] relies upon either fit within one of the categories discussed in *Stevens* (or its predecessors) or were subjected to First Amendment scrutiny." (App. 101a). The

concurrence also pointed out that the dissent did not cogently define "speech that matters," and that its proposed test invites courts to engage in the very "ad hoc," "free-wheeling," "case-by-case" approach that *Stevens* found so "startling and dangerous." (App. 106a [quoting *Stevens*, 130 S. Ct. at 1585-86]).

One dissent from denial of rehearing en banc, authored by Judge O'Scannlain and joined by six judges, pressed Judge Bybee's analysis, and was along the same lines. (App. 116a-135a). A second dissent, authored by Judge Gould, would permit Congress more leeway to legislate in the context of the military. (App. 135-138a).

Chief Judge Kozinski authored a separate concurrence from denial of rehearing in which he teased out the importance of one's right to define oneself in the manner of one's choosing:

> So what, exactly, does the dissenters' ever-truthful utopia look like? In a word: terrifying. If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review."

(App. 107a). This, Judge Kozinski reasoned, ran contrary to the First Amendment principles: "[O]ne fundamental concern of the First Amendment is to 'protec[t] the individual's interest in self-expression,'" and "[s]elf expression that risks prison if it

strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all." (App. 108a-109a [internal citation omitted]). In other words: "Saints may always tell the truth, but for mortals living means lying." (App. 109a).

ARGUMENT

Xavier Alvarez, a newly-elected member of an obscure local water board, stood up at a board meeting and boasted that twenty years earlier he had been awarded the Medal of Honor. It was a lie. No one detrimentally relied on his false statement or was caused harm in any way; and it did not help him to obtain any tangible or intangible benefit. (App. 29a, 94a). But as a result of that non-defamatory lie about himself, the government prosecuted Mr. Alvarez under the Stolen Valor Act of 2005, 18 U.S.C. § 704(b), which makes it a crime to falsely claim, either verbally or in writing, the receipt of military decorations or medals. In a lengthy, well-reasoned decision, the court of appeals applied the strict scrutiny standard applicable to content-based restrictions on speech, *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000), and held that the Act is not narrowly tailored to achieving a compelling government interest and therefore was unconstitutional on its face. Having been unable to convince the court of appeals that the "*mere utterance*" (App. 2a) of a non-defamatory falsehood about oneself is unprotected by the First Amendment's guarantee of freedom of speech, the government seeks review by this Court in a renewed effort at arguing that falsehoods, as a general rule, are among those categories of speech that receive no constitutional protection. This Court has never so expressly held, and should

decline the invitation to do so here.

The government's argument for why its petition should be granted boils down to two assertions: (1) a federal statute was declared unconstitutional, and (2) it should not have been. But while the fact that a law has been declared unconstitutional can be a weighty factor in this Court's certiorari decision, it is not alone sufficient. *See* Pub. L. No. 352, 100th Cong., 2d Sess., 102 Stat. 662 (1988) (codified at 28 U.S.C. § 1254 (2006)) (repealing congressional mandate that the Court review all cases in which a federal statute is declared unconstitutional). And myriad factors present here weigh against granting the petition. These include:

- there is no conflict among the circuits;
- the law has been infrequently applied;
- the issue is currently pending in four circuits thus giving this Court multiple opportunities to consider the question in the near future with the benefit of their collective wisdom before settling such a significant constitutional matter; and
- legislation has been introduced in Congress to amend the Act in an attempt to address the constitutional concerns raised by the court of appeals in this case.

Moreover, the court of appeals' holding that § 704(b) is facially unconstitutional is based on a straightforward application of this Court's precedents and a strict scrutiny analysis of the content-based restriction on speech. This Court, in fact, has denied review of similar constitutional rulings when the court of appeals' analysis

simply applies well-settled constitutional law or has limited practical implications for the government. *See, e.g.*, *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009) (denying Solicitor General's petition seeking review of a court of appeals decision holding the Child Online Protection Act unconstitutional, where the court of appeals simply applied established First Amendment law); *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) (denying Solicitor General's petition for review of a decision striking down a prohibition on advertising of casino gambling on First Amendment grounds where the court of appeals' ruling followed established precedent); *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) (denying review after court of appeals struck down the federal Lead Contamination Control Act as unconstitutional); *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) (denying review of decision holding that part of the National Labor Relations Act violated the First Amendment). Denial of certiorari is likewise warranted here.

A. Because no conflict currently exists among the courts of appeals, cases addressing this issue are currently pending in four other circuit courts, and the law has been applied infrequently, this Court's review of the issue is not necessary at this time.

As the government itself acknowledges, "the decision below is the first court of appeals decision to address section 704(b)'s constitutionality." (Pet. 13). Moreover, while Alvarez may have been the first to challenge the Stolen Valor Act

on constitutional grounds, he is not the last. "[T]he question is currently pending in four other circuit courts." (Pet. 13).[4] Thus – should any conflict develop – there will be ample opportunity in the very near future for this Court to review the constitutionality of the Act, and its implications regarding First Amendment protection for false statements of fact, but with the added benefit of having input and wisdom from multiple additional sources. As Justice Stevens has noted, "experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process." John Paul Stevens, "Some Thoughts on Judicial Restraint," 66 Judicature 177, 183 (1982). And allowing further percolation in the lower courts also will assist the Court in fully evaluating the ramifications that a decision in this case might have on First Amendment jurisprudence and on criminal prosecutions throughout the country. *See* Eugene Gressman et al., *Supreme Court Practice* (9th

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[4]In the Tenth Circuit, the court heard argument on May 12, 2011, in *United States v. Strandlof*, No. 10-1358 (10th Cir.), a case in which the district court dismissed § 704(b) charges on First Amendment grounds. The Eleventh Circuit is set to hear argument on the constitutionality of the Stolen Valor Act on November 29, 2011, in *United States v. Amster*, No. 10-12139 (11th Cir.). In the Eighth Circuit, the issue is fully briefed in *United States v. Kepler*, No. 11-2278 (8th Cir.), a government appeal of another district court decision declaring the Stolen Valor Act facially unconstitutional, and is thus waiting for argument. And finally, in the Fourth Circuit, two trial courts have addressed the issue. In *United States v. Robbins*, No. 11-4757 (4th Cir.), the district court upheld the constitutionality of the Stolen Valor Act and the issue is on appeal. A magistrate court in the District of Maryland found the law unconstitutional, Memorandum Opinion and Order, *United States v. Lawless*, No. 11-cr-475-PJM/11-mj-173-TMD (D. Md. Aug. 29, 2011); that decision is set to be reviewed by the district court, and almost certainly will proceed to the Fourth Circuit as well.

ed.), § 6.37(i)(1), at 503-04 ("The more important an issue is, the more the Court would benefit by allowing the issue to percolate so it may avail itself of the wisdom of other courts before settling a momentous matter."). Indeed, the "perspective of time" may help shed more light on the important constitutional question posed by the petition. *See Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting).

It may turn out that the other circuits will concur with the Ninth Circuit's result here. For example, the Eighth Circuit recently relied on the Ninth Circuit's decision in this case in holding that knowingly false campaign speech is not categorically outside the protection of the First Amendment. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 633-36 (8th Cir. 2011).[5] And district judges in the District of Colorado and the Southern District of Iowa, and a magistrate judge in

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[5]There, the district court, relying on the same cases the government relies on here, concluded – just as the government argues here – that knowingly false speech is "is valueless and categorically exempt from First Amendment protection." *281 Care Comm.*, 638 F.3d at 634. The court of appeals rejected that argument, finding that "the Supreme Court has never placed knowingly false campaign speech categorically outside the protection of the First Amendment," and explaining that "all the language the district court and defendants cited comes from cases dealing with otherwise unprotected speech, namely fraudulent or defamatory speech. We follow the lead of the Ninth Circuit in concluding that this language dismissing the value of knowingly false speech, when read in context of the opinions, does not settle the question here today." *Id.* (citing *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010)). It expressly rejected the identical argument the government presents here that "the categorical exemption of defamatory speech is actually an exemption of all knowingly false speech," explaining that "defamation-law principles are justified not only by the falsity of the speech, but also by the important private interests implicated by defamatory speech." *Id.* at 634-35 (citations omitted).

the District of Maryland, have also declared the Stolen Valor Act facially unconstitutional. *See supra* n.3.[6] As such, the question presented is best left for further analysis and evaluation in the lower courts unless and until categorical disagreements emerge.

Moreover, because the law is so infrequently used, and when it is, it is often charged in combination with other crimes, *see infra*, 15-16, there is little need at this time to address the law's constitutionality. *Cf.* U.S. Cert. Br. 11, *Small v. United States*, No. 03-750, 2004 WL 349912, at *11 (2004) (Solicitor General suggests that review of decision concerning the scope of criminal prohibition could be postponed given the infrequency with which the issue arises). In the nearly five years since the law went into force, prosecutions under § 704(b) have averaged less than ten filings per year, accounting for less than 0.0001% of federal prosecutions.[7] Notably, the Solicitor General himself has argued against review on grounds that

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[6]In the one district court case upholding the constitutionality of the Act, the court was able to do so *only* because it read an additional element of fault into the law – an intent to deceive – that simply does not exist. *See United States v. Robbins*, 759 F. Supp. 2d 815, 819 (W. D. Va. 2011) ("The government concedes that the statute should be read to criminalize only ***knowingly*** false statements. I conclude that the statute should be read to include a mens-rea requirement that the defendant *intended to deceive*.") (emphasis in original).

[7]A review of all § 704 prosecutions reported in the Transactional Records Access Clearinghouse ("TRAC"), which compiles statistics about federal prosecutions, as well as all prosecutions reported in United States Attorney's Offices press releases or on the websites that track the Stolen Valor Act, indicate that no more than 45 cases have been prosecuted in the five years since the law was enacted. TRAC reports that the yearly total of federal prosecutions, for the last five years, ranges from 117,651 to 165,346.

apply with equal force here, reasoning that "[t]his is a case of first impression and, at least to this point, does not appear to be of recurring significance." U.S. Br. in Opp., Wilson, *supra*, at 16 (No. 90-1362). Likewise here, as there, "there is no court of appeals conflict on this issue and, indeed, no other court of appeals decisions on the subject." *Id.*[8]

Respondent acknowledges that to deny certiorari in this case in order to allow other circuits to weigh in would leave the status of the Stolen Valor Act uncertain. At the same time, this uncertainty will not leave prosecutors entirely powerless to combat military fraud. A significant number of the relatively few § 704(b) prosecutions also charge some other related conduct. *See, e.g.*, Indictment, *United States v. Barnhart*, No. 09-59 (W.D. Va. Oct. 15, 2009), ECF No. 3 (charging, in addition to § 704(b), one count of 18 U.S.C. § 641, theft of government property, based on false claims of veteran's disability benefits); Indictment, *United States v. Perkins*, No. 08-353 (W.D. Wash. Oct. 23, 2008), ECF No. 1 (also charging 18 U.S.C. § 498, use or possession of falsified or forged DD-214, military discharge papers, in connection with false claim for Veteran's Administration benefits); Superseding Indictment, *United States v. Robbins*, No. 10-6 (W.D. Va. Nov. 18, 2010), ECF No. 25 (also charging 18 U.S.C. §§ 498 and 1341, fraud based on false claim for

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[8]The government argues here that because there are four pending circuit cases involving the constitutionality of the Stolen Valor Act that "the issue is a substantial and recurring one." (Pet. 14). But, in actuality, it represents nothing more than the fact that a relatively recent law that is infrequently applied has been challenged a handful of times and the law is starting to be reviewed for the first time.

veteran's benefits); Indictment, *United States v. Kepler*, No. 11-17 (S.D. Iowa Feb. 24, 2011), ECF No. 2 (also charging 18 U.S.C. § 1347, health care fraud, for false claim for veteran's health care benefits); Indictment, *United States v. Bishop*, No. 10-554 (D. Ariz. Apr. 28, 2010), ECF No. 1 (also charging 18 U.S.C. §§ 498 and 1343, wire fraud, based on false claim that led to unwarranted salary increases from federal agency). Thus denying certiorari will not leave the government without ammunition to combat false claims of military honors. Perhaps more importantly, there are adequate bases to prosecute and obtain restitution where such fraud results in loss to the government, which is perhaps the context in which the government has the strongest interest in immediate prosecution. Thus the institutional cost of allowing the issue to percolate in the courts of appeals for another year – in which an additional four circuits may weigh in on the issues – is not as substantial as the government claims.

B. As a legislative "fix" may be in the offing, it is unnecessary to review the issue at this time.

On May 5, 2011, in direct response to the Ninth Circuit's decision in this case, Representative Joe Heck introduced H.R. 1775, the Stolen Valor Act of 2011, in the House of Representatives. *See* H.R. 1775, 112th Cong.; 157 Cong. Rec. H3108 (daily ed. May 5, 2011). He was joined by fifty-one co-sponsors, representatives from both political parties. The bill would strike subsection (b) of 18 U.S.C. § 704, the provision under which Alvarez was convicted, and replace it with a provision that would criminalize "knowingly mak[ing] a misrepresentation regarding his or

her military service" "with the intent to obtain anything of value." H.R. 1775 § 2. In the case of misrepresentations "that such individual served in a combat zone, served in a special operations force, or was awarded the Congressional Medal of Honor," the offense is punishable by not more than one year in custody; in "any other case," the offense is punishable by six-months imprisonment. *Id.* The bill also establishes a defense if the thing of value is "de minimis." *Id.* As Representative Heck explained, "[a] previous version of this bill was passed by Congress, and although it was very popular, it was struck down by the 9th Circuit Court as violating free speech. My bill takes a different approach – making it illegal for individuals to benefit from lying about their military service or record." "Heck Introduces Stolen Valor Act of 2011," Congressman Joe Heck, Press Releases, May 5, 2011, <http://heck.house.gov/press-release/heck-introduces-stolen-valor-act-2011> (last visited Sept. 14, 2011). He indicated he was "confident this approach will pass constitutional review." *Id.* The bill was referred to the Judiciary Committee, and the Sub-Committee on Crime, Terrorism, and Homeland Security, on June 1, 2011.

Given that Congress is considering amending the statute in an effort to address the constitutional concerns raised by the court of appeals in this case – and that there have been only a small number of prosecutions brought under the current law – this Court need not waste its limited time reviewing a law that may soon cease to exist in its present form. And allowing Congress the opportunity to fix the law would be preferable to judicial intervention. Should the proposed

legislative changes ultimately fail, the Court still will have multiple opportunities to consider the constitutional question presented given the number of cases currently under review in the lower courts.

C. Review is unnecessary to address the court of appeals' straightforward application of this Court's precedents and strict scrutiny analysis to the content-based restriction on speech enshrined in the Act.

The Ninth Circuit's holding that the Stolen Valor Act is unconstitutional rests on the proper application of well-settled First Amendment law. The government's arguments for why the Act is constitutional, and the analysis it believes should apply for determining the law's constitutionality, are based on a fundamental misreading of this Court's precedents and were rightly rejected by the court of appeals. Judge M. Smith summed up well the issues presented by this case and what actually is in dispute. "This case presents two issues:

> (1) Does the government bear the burden of proof to show that speech forbidden by the Stolen Valor Act (the Act), 18 U.S.C. § 704(b), is unprotected by the First Amendment, or does a criminal defendant charged under the Act bear the burden of proof to show that the targeted speech is protected by the First Amendment? (2) Is the speech forbidden by the Act protected by the First Amendment, or does it fall into one of the "well-defined and narrowly limited classes of speech" that is unprotected by the First Amendment, *United States v. Stevens*, — U.S. —, 130 S. Ct. 1577, 1584 [] (2010) (internal quotation mark omitted)?

(App. 92a). There was no dispute among the judges below, whether in majority or dissent, that "the Act 'seek[s] to regulate "only . . . words,"' that the Act targets words about a specific subject (military honors), and that the Act is plainly a

content-based regulation of speech." (App. 93a-94a) (citations omitted). Also, there was no dispute that "because the Act imposes a content-based restriction on speech, it is subjected to strict scrutiny, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 [] (2000), unless the speech it criminalizes falls into one of the 'well-defined and narrowly limited classes of speech' that is unprotected by the First Amendment, *Stevens*, 130 S. Ct. at 1584 (internal quotation mark omitted)." (App. 94a). "There [wa]s also no meaningful dispute between the majority and the Dissenters concerning whether the Act survives strict scrutiny if it does not fall into one of the *Stevens* subcategories of speech that is unprotected by the First Amendment." (App. 94a). Indeed, although the dissent did not believe that strict scrutiny analysis applied, even it agreed that *if* the Act were subjected to strict scrutiny, "the Act would not satisfy this test." (App. 70a).[9]

What the government and dissent argued below is that there is a "general rule" that "false statements of fact are not protected by the First Amendment," with "certain limited exceptions where First Amendment protection is necessary 'to protect speech that matters.'" (App. 44a-50a). Indeed, the government argues that the court of appeals "erred in applying strict scrutiny simply because it concluded that the speech prohibited by Section 704(b) does not fall within a category of speech that historically has been completely unprotected by the First Amendment."

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[9]The government maintains that § 704(b) can be upheld even if strict scrutiny applies. (Pet. 29-30). That position is entirely meritless. Despite its best efforts below, the government was unable to persuade even a single one of the seven dissenting judges to that position.

(Pet. 23). It argues that the court instead should have applied a so-called "'breathing space' analysis." (Pet. 23). It apparently rejects as the general, fundamental rule, the rule outlined in the First Amendment itself that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I.

Thus, the primary dispute here is whether knowing falsehoods are among the very limited categories of speech, "the prevention and punishment of which have never been thought to raise any Constitutional problem." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

But, as this Court recently explained, "[f]rom 1791 to the present . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas," and has never 'include[d] a freedom to disregard these traditional limitations.' These 'historic and traditional categories long familiar to the bar,'" include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.* (citations omitted). Previously, the Court explained that "[t]hese include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572 (citation omitted).[10] In *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), a defamation case, the Court also listed other low value speech categories as including "insurrection,

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[10]The Court has since held that profanity is protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15 (1971).

contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business."[11] In *no* prior case, however, has this Court included knowing falsehoods or lies among those categories of speech unprotected by the First Amendment.[12]

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[11]This Court recently noted that "[t]he First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008).

[12]As one commentator has explained, "[s]ome hints can be found in the defamation cases that falsehoods are inherently pernicious; but thus far the Court has not given the concrete and particularized account of the evil to be redressed that would provide a credible explanation for why nondefamatory falsehoods are punishable in the face of protections for freedom of speech." Dianne M. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364, 423 (1989). Another commentator similarly has found nothing in this Court's precedents expressing that non-defamatory falsehoods are generally not entitled to First Amendment protection: "It is unclear whether, as a doctrinal matter, there is a constitutional right to utter intentionally false statements under any circumstances. Obviously there is no constitutional right to commit fraud, perjury, libel or myriad other wrongs that can be committed through speech." Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest For a Constitutional Right to Lie*, 78 Temple L. Rev. 151, 157 (2005) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating in dicta that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.")). "On the other hand, in other statements the Court has suggested that even if no constitutional protection exists for false statements for their own sake, the theory that the costs associated with policing the veracity of speech on matters of public concern are higher than those associated with permitting false expression may nevertheless make intentionally false statements relatively immune from liability in some contexts." *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (arguing that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive . . . .'") (citing *NAACP v. Burton*, 371 U.S. 415, 433 (1963)). "Indeed, one of the current members of the Court, while working as a law professor, recognized '[t]he near absolute protections given to false but

To the contrary, in *Sullivan*, this Court explained that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker." 376 U.S. at 271. And the Court made clear that this applies even to the patently erroneous statement made in bad faith. *Id.* at 272 & n.13 (citation omitted). "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error." *Id.* at 279 n.19 (citations omitted). In *Meyer v. Grant*, 486 U.S. 414, 419 (1988), this Court explained that "the First Amendment is a value-free provision whose protection is not dependent on the truth, popularity or social utility of the ideas and beliefs which are offered." (internal quotation marks omitted). And this Court has cautioned that "in this field every person must be his own watchman for the truth, because the forefathers did not trust any government to separate the true from the false for us." *Id.* at 419-20 (internal quotation mark omitted); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

"[A]dopt[ing] the government's approach as the general rule for false factual speech [would] turn[] customary First Amendment analysis on its head." (App.

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nondefamatory statements of fact outside the commercial realm.'" (App. 100a) (quoting Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 477 (1996)).

11a). As the court of appeals correctly explained, "[a]ny rule that certain speech is not protected by this foundational principle [the Free Speech Clause] is the exception, which may in turn be subject to other exceptions to protect against such exceptions swallowing the rule." (App. 14a). "In other words, we presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection in this case, for some reason other than the mere fact that it is a lie." (App. 14a).

The fact is, "the right to speak and write whatever one chooses – including, to some degree, worthless, offensive, and demonstrable untruths – without cowering in fear of a powerful government is . . . an essential component of the protection afforded by the First Amendment." (App. 14a).

And the right to speak about oneself – even to lie – is "the kind of speech that is intimately bound up with a particularly important First Amendment purpose: human self-expression." (App. 108a). As Justice Marshall has explained:

> The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's self worth and dignity.

Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring). *See also* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1009 (2006) ("[A]ccepting

unlimited government power to prohibit all deception in all circumstances would invade our rights of free expression and belief to an intolerable degree, including most notably – and however counterintuitively – our rights to personal and political self rule."). And this Court recently recognized that "[o]ne fundamental concern of the First Amendment is to 'protec[t] the individual's interest in self-expression.'" *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.2 (1980)) (second alteration in original). "Speaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts or tell tall tales. Self-expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all." (App. 108a-109a).

Justice Brandeis long ago explained that our nation's founders "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that . . . discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . ." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). And as Chief Judge Kozinski correctly explained here,

> Political and self expression lie at the very heart of the First Amendment. If the First Amendment is to mean anything at all, it must mean that people are free to speak about themselves and their country as they see fit without the heavy hand of government to keep them on the straight and narrow. The Stolen Valor Act was enacted with the noble goal of protecting the highest

> honors given to the men and women of our military, but the freedoms for which they fight include the freedom of speech. The ability to speak openly about yourself, your beliefs and your country is the hallmark of a free nation.

(App. 115a).

To uphold the Stolen Valor Act would be to tread new ground for another reason. This Court has recognized, in different contexts, that the government cannot limit speech for the purpose of protecting the reputation of the government itself, or of its symbols. As the Ninth Circuit pointed out, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." (App. 24a [quoting *Sullivan*, 376 U.S. at 291]). Likewise, in *Johnson v. Texas*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), this Court struck down laws that would criminalize flag-burning. While "the government has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country,'" the Court nonetheless "decline[d] . . . to create for the flag an exception to the joust of principles protected by the First Amendment." *Johnson*, 491 U.S. at 418 (citation omitted). And yet the law here was enacted for the very purpose of protecting the "reputation" of military decorations. *See* Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266. It is therefore repugnant to the First Amendment. The speech at issue in *Johnson* shares another characteristic with this case: In *Johnson*, this Court concluded that Texas's fear that flag-burning would cause riot or strong offense proved that the special role of the flag was not in

danger, *id.* at 419; likewise, the rancor with which individuals who falsely claim military honors are treated in the community proves that the high esteem given to military decorations is not in serious danger.

Criminalizing the telling of a lie about oneself – even a lie which might tend to tarnish the reputation of a military honor – is simply beyond the limited exceptions to the constitutional dictate that "Congress shall make no law . . . abridging the freedom of speech." It is especially so where, as here, the lie harmed no one, and no benefit was sought or received. The court of appeals' decision was correct, broke no new ground and, as a result, further review by this Court would not materially contribute to First Amendment jurisprudence. The petition should therefore be denied.

D. Because the Act is also unconstitutional as applied to Mr. Alvarez, a political office holder, resolution of the facial constitutional issue would likely not change the outcome of this case.

Finally, as the Solicitor General argued in *Wilson*, *supra*, review of a decision invalidating a statute on constitutional grounds is not warranted when "resolution of the constitutional issues [would] have very little effect on the resolution of the underlying dispute." U.S. Br. in Opp., *Wilson*, *supra*, at 17. In this case, apart from its facial invalidity, the statute is also unconstitutional as applied to Mr. Alvarez because he was an elected public official at a public meeting describing his qualifications for the office he held when he made the statement at issue in this case. The statement was quintessential political speech. Government intrusion

into speech made by politicians is particularly suspect. Discussions of qualifications of political candidates is considered core political speech to which the highest scrutiny is afforded. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

Indeed, the Washington Supreme Court, for example, relying on this Court's unequivocal precedents addressing First Amendment protection for political speech, has twice declared facially unconstitutional state statutes that prohibited political advertisement containing false statements of material fact. *See Rickert v. State, Public Disclosure Comm'n*, 168 P.3d. 826 (Wash. 2007); *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998). The court noted that "[o]ur constitutional election system already contains the solution to the problem that [the statutes were] meant to address. 'In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "more speech, not enforced silence," thus has special force.'" *Rickert*, 168 P.3d at 832

(quoting *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))). "In other words, the best remedy for false or unpleasant speech is more speech, not less speech." *Id.*

In fact, the breadth of the protection afforded to political speech under the First Amendment is difficult to overstate in light of this Court's recent precedents. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Citizens United v. FEC*, 130 S. Ct. 876 (2010). In *Citizens United*, this Court struck down a ban on political-campaign contributions by corporations, explaining that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 130 S. Ct. at 898. Although the Court concluded that the application of strict scrutiny was sufficient to protect the speech in that case, the Court went so far as to suggest that "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter." *Id.* at 898. The Court's recent decision in *Snyder* is similarly protective of political speech. The Court's decision to overturn the verdict against defendants hinged largely on the fact that the speech defendants were held liable for was speech about matters of public concern, which the Court noted is the "'essence of self-government.'" *Snyder*, 131 S. Ct. at 1215 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

Accordingly, even were this Court to conclude that the law was not facially unconstitutional, because Mr. Alvarez would likely succeed on his as-applied challenge, this case is not a good vehicle for this Court's review.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The court of appeals held that 18 U.S.C. 704(b) is facially unconstitutional based on the erroneous assumption that restrictions on knowingly false factual statements must be subjected to strict scrutiny. That holding departs from this Court's longstanding treatment of false factual statements as entitled, at most, only to limited First Amendment protection. This Court has repeatedly upheld content-based false-speech restrictions—for instance, on baseless lawsuits, invasion of privacy, defamation, and fraud—that are supported by an important government interest and provide adequate breathing space for fully protected speech. The Ninth Circuit should have upheld Section 704(b) under that framework. Because the court has erroneously invalidated an Act of Congress that serves a crucial purpose in safeguarding the military honors system, this Court's review is warranted.

Respondent argues that certiorari should be denied because the question presented is not of broad importance and the Ninth Circuit simply applied settled law. Contrary to these contentions, Section 704(b)'s constitutionality is an unsettled question of nationwide significance. The number of challenges to Section 704(b) currently pending before the lower courts is ample evidence of the broad importance of, and the need for certainty about, the question of Section 704(b)'s validity. Moreover, far from applying settled law, the Ninth Circuit broke new ground in invalidating a narrow prohibition on knowingly false factual representations about military honors, despite the compelling interests supporting the law and the ample breathing space for protected speech. The petition for a writ of certiorari should therefore be granted.

1. The decision below declares an Act of Congress unconstitutional on its face. Pet. App. 39a ("As presently drafted, the Act is facially invalid under the First Amendment."). Respondent agrees with that characterization of the Ninth Circuit's decision. Br. in Opp. 9. The court of appeals' decision warrants this Court's review for that reason alone.

Review is particularly appropriate in light of the Ninth Circuit's recent decision in *United States* v. *Perelman*, No. 10-10571 (Sept. 26, 2011), in which the court underscored that its decision in *Alvarez* was premised on the conclusion that Section 704(b) "lacks a scienter requirement to limit the Act's application." Slip op. 18,431 (distinguishing Section 704(b) from Section 704(a), which prohibits knowingly wearing a medal or a colorable imitation thereof without authorization) (internal quotation marks and citation omitted); see Pet. App. 22a-23a. The Ninth Circuit's interpretation of Section 704(b) as prohibiting unknowing falsehoods is not only contrary to Section 704(b)'s language, see Pet.

16-17; it also disregards the principles that criminal statutes presumptively require scienter, and that statutes should be interpreted to avoid constitutional doubt. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994). The Ninth Circuit's facial invalidation of Section 704(b) on the basis of its departure from well-established principles of statutory construction warrants this Court's review.

Respondent suggests (Br. in Opp. 11-12) that this Court should nonetheless deny review because no other court of appeals has yet ruled on Section 704(b)'s constitutionality. As the petition explains, however, four other courts of appeals are currently considering challenges to Section 704(b)'s constitutionality.[1] See Pet. 14-15. That fact demonstrates that the question is of nationwide importance. Moreover, the courts considering these challenges will either create a circuit conflict by upholding Section 704(b), or agree with the Ninth Circuit and strike the provision down, further limiting the enforcement of Section 704(b). Additional decisions therefore will only underscore the necessity for this Court's review. In addition, the Ninth Circuit's decision has cast a shadow over the statute, as other lower court decisions invalidating the statute have generally relied on the Ninth Circuit's reasoning. See, *e.g.*, Order, *United States* v. *Kepler*, Docket entry No. 28, No. 4:11-cr-17 (S.D. Iowa May 31, 2011); Mem. Op. and Order, *United States* v. *Lawless*, Docket entry No. 8, No. 11-mj-173 (D. Md. Aug. 29, 2011). In these circumstances, the decision

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[1] Since the petition was filed in this case, an additional indictment has been dismissed by a magistrate judge on the ground that Section 704(b) is unconstitutional. See Mem. Op. and Order, *United States* v. *Lawless*, Docket entry No. 8, No. 11-mj-173 (D. Md. Aug. 29, 2011). The government is appealing that decision to the district court.

below should not be allowed to stand without plenary review.

Nor is there any reason to defer review until other courts have ruled. Contrary to respondent's argument (Br. in Opp. 12-13), further percolation would not materially aid this Court's consideration. This case gave rise to six opinions by five Ninth Circuit judges. Pet. App. 1a (Smith, J.); *id.* at 41a (Bybee, J., dissenting); *id.* at 91a (Smith, J., concurring in denial of rehearing en banc); *id.* at 107a (Kozinski, C.J., concurring in denial of rehearing en banc); *id.* at 116a (O'Scannlain, J., dissenting from denial of rehearing en banc); *id.* at 135a (Gould, J., dissenting from denial of rehearing en banc). Three of those opinions explained the court's reasons for invalidating Section 704(b), while the other three argued that Section 704(b) should be upheld in reliance on varying theories. In reviewing the Ninth Circuit's decision, then, this Court would have the benefit of thorough appellate consideration of arguments for and against the statute's validity.

2. Respondent next argues (Br. in Opp. 14) that review is unwarranted because Section 704(b) is "infrequently used." To the contrary, the government has regularly brought prosecutions under Section 704(b), as the number of pending cases demonstrates. The provision also serves the important purpose of deterring knowingly false claims to have won a military award: the Federal Bureau of Investigation addresses many reported instances of false claims simply by explaining to the claimant that Section 704(b) prohibits such misrepresentations. Section 704(b) is thus a key component of the military honors system, as it helps prevent false claims that dilute the efficacy of military awards. See Pet. 13-16.

In any event, this Court often has reviewed lower court decisions striking down Acts of Congress even when, unlike

here, prosecutions under the relevant federal law are relatively few in number. See, *e.g.*, *United States* v. *Stevens*, 130 S. Ct. 1577 (2010) (addressing constitutionality of rarely used federal statute prohibiting certain depictions of animal cruelty); *United States* v. *Williams*, 553 U.S. 285, 290-291 (2008) (addressing constitutionality of a federal statute criminalizing child pornography using virtual images, even though little evidence existed of prior trafficking in virtual child pornography). Although no jurisdictional statute currently requires this Court to grant certiorari whenever an Act of Congress has been declared unconstitutional, the Court's usual practice is to grant review in such cases.

3. Respondent observes (Br. in Opp. 10-11) that this Court does not invariably grant certiorari when an Act of Congress has been declared invalid, and he contends that this case is analogous to prior cases in which the Court has denied review of such a decision. But significant differences exist between this case and those on which he relies. In *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998), the government "d[id] not ask this Court to take up the underlying constitutional issue," Pet. at 12-13, *Valley Broad. Co.*, *supra* (97-1047). In *ACORN* v. *Edwards*, 81 F.3d 1387 (5th Cir. 1996), cert. denied, 521 U.S. 1129 (1997), the United States had declined to defend the constitutionality of the provision that was at issue in the private party's certiorari petition.[2] And in *ACLU* v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 129 S. Ct. 1032 (2009), the Court had passed on the validity of the challenged statute (the Child Online Protection Act) on two prior occasions, see *id.* at 185-186. In con-

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[2] In *Wilson* v. *NLRB*, 920 F.2d 1282 (6th Cir. 1990), cert. denied, 505 U.S. 1218 (1992), the government urged the Court to deny certiorari.

trast, this Court has never addressed the constitutionality of Section 704(b).

4. Petitioner next contends (Br. in Opp. 16-18) that because an amendment to the Act was introduced in the House of Representatives in May 2011, this Court's review is unwarranted. See H.R. 1775, 112th Cong.; 157 Cong. Rec. H3108 (daily ed. May 5, 2011); Pet. 7 n.1. The proposed bill's pendency does not diminish the need for this Court's review, however, because H.R. 1775 is not currently the law and the prospects that it will ever become law are at best uncertain. Cf. *Leal Garcia* v. *Texas*, 131 S. Ct. 2866, 2867 (2011) (per curiam) ("Our task is to rule on what the law is, not what it might eventually be."). The bill has been referred to the House Judiciary Committee and its Subcommittee on Crime, Terrorism, and Homeland Security, but no further action has been taken and no hearings have been scheduled. No comparable legislation has been introduced in the Senate.

In any event, the government has a strong interest in defending the validity of those prosecutions that it has brought, and the convictions it has obtained, under Section 704(b) as enacted. Moreover, unless and until Section 704(b) is amended, the government will continue to have an interest in prosecuting new violations of Section 704(b) in its current form, in order to ensure the integrity and efficacy of the military honors system. H.R. 1775's pendency therefore does not diminish the importance or urgency of the question whether Section 704(b) is constitutional.

5. Contrary to respondent's contention, the court of appeals' holding represents an innovation in constitutional law rather than simply an "application of well-settled First Amendment law." Br. in Opp. 10, 18-26. This Court has never considered whether knowingly false claims to have been awarded a military medal may be prohibited consis-

tently with the First Amendment. Nor has the Court suggested, more broadly, that all statutes that prohibit false factual statements—of which there are many, see Pet. App. 67a n.7—must survive strict scrutiny.

As respondent observes (Br. in Opp. 20), the types of false factual statements that the Court has described as historically unprotected by the First Amendment have involved specific legal contexts, such as defamation and fraud. See *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011); *Stevens*, 130 S. Ct. at 1584. Contrary to respondent's argument and the Ninth Circuit's decision, however, that fact does not mean that courts should subject other restrictions on false factual statements to strict scrutiny. The Court has repeatedly stated that false factual statements "are not protected by the First Amendment in the same manner as truthful statements." *Brown* v. *Hartlage*, 456 U.S. 45, 60-61 (1982) (citation omitted). It has accordingly permitted restrictions on false factual statements in a variety of contexts without applying strict scrutiny. Instead, the Court has considered whether the restriction is supported by a government interest and whether it accommodates that interest and First Amendment concerns by providing adequate "breathing space" for fully protected speech. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271-272 (1964).

Although respondent relies (Br. in Opp. 22) on the Court's statement in *New York Times Co.* that the First Amendment does not have "an exception for any test of truth," 376 U.S. at 271, 279 & n.19, *New York Times Co.* itself recognized that the State had a legitimate interest in preventing and punishing defamatory falsehoods. The Court therefore held that a defamation cause of action was constitutionally permissible so long as it contained a scien-

ter requirement to provide adequate "breathing space" to truthful speech and criticism of the government. *Id.* at 271-272, 279-280; see *Gertz*, 418 U.S. at 341. The Court has employed that analysis—rather than strict scrutiny—in other false-statement contexts, including fraud, liability for baseless lawsuits, false-light invasion of privacy, and intentional infliction of emotional distress through false statements. See *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 531 (2002); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388-389 (1967); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 53, 56 (1988).

Respondent is therefore incorrect in asserting that the Ninth Circuit followed this Court's precedents when it held that Section 704(b) should be subjected to strict scrutiny. The Ninth Circuit should have employed the "breathing space" analysis that this Court has applied to restrictions on false factual statements, and it should have concluded that Section 704(b) is constitutional. The provision serves a compelling interest in protecting the integrity of the military honors program, thereby preserving the medals' ability to foster morale and esprit de corps in the military. Pet. 23-26. It also provides ample breathing space to fully protected speech because it poses no danger of chilling effect and it extends no further than necessary.[3] See *Gertz*, 418 U.S. at 342; Pet. 26-28.

Respondent contends (Br. in Opp. 25) that Section 704(b) prohibits "libel on government," similarly to the stat-

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[3] For much the same reasons, Section 704(b) would survive strict scrutiny. But see Br. in Opp. 19 n.9. Contrary to the Ninth Circuit's view, the provision is narrowly tailored to the government's compelling interest because the aggregate effect of knowingly false claims is to dilute the value and meaning of military awards, and relying on counter-speech would be inadequate to prevent that harm. See Pet. 29-30.

utes prohibiting flag burning that were struck down in *Texas* v. *Johnson*, 491 U.S. 397 (1989), and *United States* v. *Eichman*, 496 U.S. 310 (1990). Unlike those statutes, however, Section 704(b) is not directed at criticism of a government symbol. Section 704(b) does not prevent anyone from criticizing medal recipients, the military awards system, military policy, or any official action. Nor does it prohibit desecration or destruction of medals in order to express a point of view. Rather, Section 704(b) prohibits only knowingly false claims to have been awarded a medal—in other words, claims that misappropriate the official honor and approbation that the medals signify, thereby diminishing their ability to serve their important purposes. See Pet. 27-28. Preventing misappropriation and dilution of military honors by means of knowing misrepresentations is a legitimate—and compelling—government interest that is entirely consistent with the First Amendment and entirely unrelated to the suppression of dissent. See *United Seniors Ass'n* v. *SSA*, 423 F.3d 397, 407 (4th Cir. 2005) (upholding statute prohibiting use of the words "social security" in a way that conveys false impression of government endorsement), cert. denied, 547 U.S. 1162 (2006); see also *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 531-535, 532 n.8 (1987).

Respondent also argues (Br. in Opp. 22) that the government may not establish itself as the arbiter of whether speech is truthful or false. Section 704(b) does not give rise to any such danger. Unlike the situations described in *Meyer* v. *Grant*, 486 U.S. 414, 419 (1988), see Br. in Opp. 22, this case does not involve a statute that restricts criticism of the government or that burdens a category of disfavored advocacy. Section 704(b) prohibits only a narrow category of knowing, verifiably false statements of fact about the speaker himself. Because the line between a knowingly

false award-related claim and all other statements—about military service, valorous acts, military policy, or the like—is well-defined and objective, the government would not be able to use Section 704(b) as a means of imposing its own view of "truth" or punishing criticism. Cf. *New York Times Co.*, 376 U.S. at 272.

Nor is respondent correct (Br. in Opp. 23-25) that Section 704(b) prohibits exaggerations in describing oneself or other means of self-expression that go beyond "the monotonous reporting of strictly accurate facts about oneself." Section 704(b) prohibits only those misrepresentations that are reasonably understood as assertions of fact, thereby preserving hyperbole, satire, and other expressive statements, and it sweeps no further than necessary to prevent the significant harm arising from deceptive claims. Upholding Section 704(b) on the basis of the government's compelling interest in the integrity of the military honors system and Section 704(b)'s provision of ample breathing space to fully protected speech would not suggest that the government may prohibit all forms of "embellish[ment]" or "tell-[ing] tall tales." *Id.* at 24.

6. Finally, respondent contends that the Court should not grant review because Section 704(b) is unconstitutional as applied to him. Respondent argues that because he made his false claims while introducing himself as an elected officer at a water district meeting, he was punished for political speech. The Ninth Circuit did not pass on this argument, and no judge suggested that the court could rule on the narrower ground that respondent was engaged in political speech. That is unsurprising. Respondent's knowingly false representation was not a "[d]iscussion[] of qualifications of political candidates," "governmental affairs," or "public issues," Br. in Opp. 27, nor did it assist in expressing any opinion on these issues. Under Section 704(b), re-

spondent was free to express his views on public office in any way he wished. He was not free, however, to knowingly misrepresent that he had been awarded the Nation's highest military honor. Moreover, respondent's making of his false claims during a political event does not immunize him from prosecution under an otherwise constitutional statute that prohibits a narrow category of knowing misrepresentations without regard to the context in which they are made—any more than the political context would immunize defamation or fraud. Section 704(b) does not "suppress ideas or opinions in the form of 'pure political speech,'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2723-2724 (2010), and it is not unconstitutional as applied to respondent.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

SEPTEMBER 2011

JOINT APPENDIX

No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED: OCT. 17, 2011

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

08-50345

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

XAVIER ALVAREZ, DEFENDANT-APPELLANT

Filed: Sept. 26, 2007

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
8/5/08	1	**DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in District Court on 08/05/2008. Reporters Transcript required: Yes. Sentence imposed: probation. Transcript shall be ordered by 08/26/2008 for Appellant Xavier Alvarez. Transcript shall be filed by 10/27/2008. Appellant briefs and excerpts due by 12/04/2008 for Xavier**

DATE	DOCKET NUMBER	PROCEEDINGS
		Alvarez. Appellee brief due 01/05/2009 for United States of America. Appellant reply brief due by 01/20/2009 for Xavier Alvarez.—[Edited 08/08/2008 by BY] (PG)
		* * * * *
2/13/09		Filed Opening Brief [10] filed by Xavier Alvarez in 08-50345. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Blue cover, accompanied by certification that the brief is identical to the version submitted electronically. (FT)
		* * * * *
4/24/09	17	Submitted (ECF) Answering brief for review. Submitted by Appellee USA. Date of service: 04/24/2009. [6896366] (CM)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/4/09	26	ARGUED AND SUBMITTED TO THOMAS G. NELSON, JAY S. BYBEE and MILAN D. SMITH, JR.. [7119203] (LN)
		* * * * *
8/17/10	28	FILED OPINION (THOMAS G. NELSON, JAY S. BYBEE and MILAN D. SMITH, JR.) REVERSED AND REMANDED. Judge: JSB Dissenting, Judge: MDS Authoring. FILED AND ENTERED JUDGMENT. [7441940] (RP)
		* * * * *
9/30/10	33	Filed (ECF) Appellee USA petition for panel rehearing and petition for rehearing en banc (from 08/17/2010 opinion). Date of service: 09/30/2010. [7493340] (TP)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/22/10	35	Filed (ECF) Appellant Xavier Alvarez response to ,for panel and en banc rehearing (statistical entry), for panel and en banc rehearing, ,to set response by any party to anything. Date of service: 10/22/2010. [7520302]. (JDL)
	* * * * *	
3/21/11	37	Filed Order for PUBLICATION (THOMAS G. NELSON, JAY S. BYBEE and MILAN D. SMITH, JR.) Judges T.G. Nelson and M. Smith have voted to deny the petition for panel rehearing. Judge M. Smith has voted to deny the petition for rehearing en banc, and Judge T.G. Nelson has so recommended. Judge Bybee has voted to grant the petition for panel rehearing and rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge

DATE	DOCKET NUMBER	PROCEEDINGS
		requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc is DENIED. See order for full text. [7687964] (PH)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(Western Division - Los Angeles)

No. 2:07-cr-01035-RGK-1

UNITED STATES OF AMERICA

v.

XAVIER ALVAREZ

Filed: Sept. 26, 2007

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/26/07	1	INFORMATION filed as to Xavier Alvarez (1) count(s) 1. Offense occurred in Los Angeles. (mw) (Entered: 09/28/2007)
	* * * * *	
12/21/07	12	NOTICE OF MOTION AND MOTION to Dismiss Case

DATE	DOCKET NUMBER	PROCEEDINGS
		(INDICTMENT) Filed by Defendant Xavier Alvarez Motion set for hearing on 1/14/2008 at 10:00 AM before Judge Edward Rafeedie. (Attachments: # 1 Exhibit) (Fuller, Brianna) (Entered: 12/21/2007)
		* * * * *
1/2/08	13	MEMORANDUM in Opposition to MOTION to Dismiss Case *(INDICTMENT)* 12 (Missakian, Craig) (Entered: 01/02/2008)
		* * * * *
1/7/08	15	REPLY opposition MOTION to Dismiss Case *(INDICTMENT)* 12 filed by Defendant Xavier Alvarez. (Fuller, Brianna) (Entered: 01/07/2008)
		* * * * *
2/20/08	17	First SUPERSEDING INFORMATION filed as to Xavier Alvarez (1) count(s)

DATE	DOCKET NUMBER	PROCEEDINGS
		1s-2s 18 USC 704 (b), (C) (1). (lom) (Entered: 02/22/2008)
		* * * * *
4/9/08	29	MINUTES OF IN CHAMBERS ORDER by Judge R. Gary Klausner denying defendant's Motion to Dismiss the Indictment. (sw) (Entered: 04/09/2008)
		* * * * *
4/30/08	31	PLEA AGREEMENT filed by Plaintiff USA as to Defendant Xavier Alvarez (Missakian, Craig) (Entered: 04/30/2008)
		* * * * *
5/5/08	32	MINUTES OF Change of Plea Hearing held before Judge R. Gary Klausner as to Defendant Xavier Alvarez. Defendant sworn. Court questions defendant regarding the plea. The Defendant Xavier Alvarez (1) pleads GUILTY to Count 1s. The

DATE	DOCKET NUMBER	PROCEEDINGS
		plea is accepted. The Court ORDERS the preparation of a Presentence Report. Sentencing set for 7/21/2008 at 10:00 AM before Judge R. Gary Klausner. The Court vacates the 5/9/08 trial date as to this defendant. Terms of bond to remain pending sentencing. Court Reporter: Lynne Smith. (sch) (Entered: 05/05/2008)
		* * * * *
7/23/08	41	JUDGMENT AND COMMITMENT by Judge R. Gary Klausner as to Defendant Xavier Alvarez (1), Count(s) 1s, Special Assessment of $10. Fine of $5,000 with interest as provided by law. Defendant is placed on Probation on Count 1 of the First Superseding Information for 3 years under the terms and conditions of U.S. Probation Office and General Order 318. Defendant shall perform 416 hours of commu-

DATE	DOCKET NUMBER	PROCEEDINGS
		nity service, as directed by the Probation Officer. The Court makes the recommendation that the defendant perform the community service hours at the V.A. Hospital in Loma Linda. Count(s) 1, 2s, The Underlying Information and Count 2 of the First Superseding Information are dismissed. Bond is ordered exonerated. Defendant advised of right to appeal. Signed by Judge Judge R. Gary Klausner. (sch) (Entered: 07/24/2008)
		* * * * *
7/31/08	45	NOTICE OF APPEAL to Appellate Court filed by Defendant Xavier Alvarez re Appeal of (Attachments: # 1 Judgment & Commitment Order), Filed On: 7/23/08; Entered On: 7/24/08; Filing Fee. Waived. See Document Number 11. (Fuller, Brianna) Modified on 8/5/2008 (lr). (Entered: 07/31/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
9/17/08	51	AMENDED JUDGMENT as to Defendant Xavier Alvarez (1), Count(s) 1, 2s, The Underlying Information and Count 2 of the First Superseding Information are dismissed. Count(s) 1s, Special Assessment of $10. Fine of $5,000 with interest as provided by law. Defendant is placed on Probation on Count 1 of the First Superseding Information for 3 years under the terms and conditions of U.S. Probation Office and General Order 318. The fine shall be paid in monthly installments of $175.00 per month. Signed by Judge Judge R. Gary Klausner. (ca) (Entered: 09/22/2008)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 07-1035(A)-ER

UNITED STATES OF AMERICA, PLAINTIFF

v.

XAVIER ALVAREZ, AKA "JAVIER ALVAREZ,"
DEFENDANT

[Filed: Feb. 20, 2008]

FIRST SUPERSEDING INFORMATION

The United States Attorney charges:

COUNT ONE

[18 U.S.C. § 704(b), (c)(1)]

On or about July 23, 2007, in Los Angeles county, within the Central District of California, defendant XAVIER ALVAREZ did falsely represent verbally that he had been awarded the Congressional Medal of Honor when, in truth as defendant knew, he had not received the Congressional Medal of Honor.

COUNT TWO

[18 U.S.C. § 704(b), (c)(1)]

On or about November 21, 2005, in Los Angeles County, within the Central District of California, defen-

dant XAVIER ALVAREZ did falsely represent verbally that he had been awarded the Congressional Medal of Honor when, in truth as defendant knew, he had not received the Congressional Medal of Honor.

THOMAS P. O'BRIEN
United States Attorney

/s/ CHRISTINE C. EWELL
CHRISTINE C. EWELL
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Chief, Criminal Division

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Public Integrity & Environmental
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PETITIONER'S BRIEF

No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 704(b) of Title 18, United States Code, makes it a crime when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

The question presented is whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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In the Supreme Court of the United States

No. 11-210

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-90a) is reported at 617 F.3d 1198. The order of the court of appeals denying rehearing en banc (Pet. App. 91a-138a) is reported at 638 F.3d 666. The opinion of the district court (Pet. App. 139a-144a) denying respondent's motion to dismiss is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2010. A petition for rehearing was denied on March 21, 2011. On June 17, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 19, 2011. On July 14, 2011, Justice Kennedy further extended the time to Au-

gust 18, 2011, and the petition was filed on that date. The Court granted certiorari on October 17, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." Section 704 of Title 18 of the United States Code is reproduced in the appendix. App., *infra*, 1a-2a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Central District of California, respondent was convicted of making a false representation of having earned a military award, in violation of 18 U.S.C. 704(b). The district court sentenced respondent to three years of probation. The court of appeals reversed the judgment of conviction on the ground that Section 704(b) is facially unconstitutional and remanded for further proceedings consistent with its opinion. Pet. App. 1a, 5a, 39a-40a.

1. a. In 18 U.S.C. 704(b), known as the Stolen Valor Act of 2005, Congress made it a misdemeanor criminal offense, punishable by up to six months in prison, to "falsely represent[] * * * verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." Congress provided an enhanced penalty of up to one year of imprisonment for offenses involving certain enumerated awards, including the Medal of Honor. 18 U.S.C. 704(c)-(d).

b. The government's tradition of awarding military honors recognizing accomplishments and acts of valor in

service to the Nation dates back to the Revolutionary War. In 1782, General George Washington ordered the creation of several decorations recognizing military service and a valor award honoring "singularly meritorious action[s]" of "unusual gallantry," "extraordinary fidelity," or "essential service." *General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783*, at 35 (Edward C. Boynton ed., 1883; reprint 1909) (*General Orders*); Armed Forces Information Service, U.S. Dep't of Defense, *Armed Forces Decorations and Awards* 4 (1992). The purpose of Washington's valor award was "to cherish a virtuous ambition in * * * soldiers, as well as to foster and encourage every species of military merit." *General Orders* 35. General Washington specified that the award should be conferred only after rigorous examination to ensure that recipients were deserving: "the particular fact or facts on which [the award] is to be grounded must be set forth to the Commander-in-Chief, accompanied with certificates from the commanding officers * * * [or] other incontestible proof." *Ibid.* Recipients would be entitled to certain special military privileges, see *ibid.*, and they were also expected to receive more intangible rewards: "it is expected these gallant men who are thus distinguished will, on all occasions, be treated with particular confidence and consideration," *id.* at 34-35. Moreover, General Washington stated, "[s]hould any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished." *Id.* at 34.

Today, the United States government maintains a system of military decorations and honors that shares its essential characteristics with the first awards authorized by General Washington. The highest military hon-

ors are established by statute or Executive Order, and they have rigorous eligibility criteria. For instance, the Medal of Honor, which occupies the highest position in the hierarchy and was first established during the Civil War in 1861, see Act of Dec. 21, 1861, 12 Stat. 329-330, is awarded by the President, in the name of Congress, to a person who "distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty" while engaged in certain armed conflicts. 10 U.S.C. 3741; see also, *e.g.*, 10 U.S.C. 3742 (Distinguished-Service Cross, awarded for "extraordinary heroism not justifying the award of a medal of honor"), 3746 (Silver Star), 6242 (Navy Cross) and 6245 (Distinguished Flying Cross).[1] See generally The Institute of Heraldry, Office of the Administrative Assistant to the Sec'y of the Army, *Military Decorations*, http://www.tioh.hqda.pentagon.mil/awards/decorations.aspx (last visited Nov. 30, 2011).

The Department of Defense and the armed services branches have guidelines for the award of honors. See U.S. Dep't of Defense, *Manual of Military Decorations and Awards*, No. 1348.33-V1 (2010) (*Awards Manual*); see also, *e.g.*, Marine Corps Order 1650.19J (Feb. 5, 2001); SECNAV Instruction 1650.1H (Aug. 22, 2006); Army Reg. 600-8-22 (Dec. 11, 2006); Air Force Policy

[1] The listed awards are "valor awards," as they are awarded for valorous conduct. The military also confers non-valor honors for achievements, participation in combat, and other forms of meritorious service. Examples include the Combat Infantryman Badge, see Army Reg. 600-8-22, ch. 8, § 8-6; medals for participation in particular campaigns, such as the Iraq Campaign Medal, see SECNAV Instruction 1650.1H, at 4-26; medals for length of service; and badges for achievement in specialized skills such as combat medicine, parachuting, and marksmanship. See generally Army Reg. 600-8-22, ch. 8; SECNAV Instruction 1650.1H, at 4-2 to 4-63.

Directive 36-28 (Aug. 1, 1997) (AFPD). These guidelines specify the extensive criteria for an award; the number and necessary content of eyewitness statements; the standard of proof; and the necessary approvals that the recommendation must garner within the chain of command. See, *e.g.*, *Awards Manual* 30-31; SECNAV Instruction 1650.1H, at 2-5 to 2-8; Marine Corps Order 1650.19J Encl. 1, at 3-4; Encl. 2, at 1-3.

The armed services have long held the view that the awards program performs crucial functions. The conferral of awards is considered "an important aspect of command responsibility at all levels" because the "[p]rompt and judicious recognition of an individual's achievement or service is a vital factor of morale." Marine Corps Order 1650.19J Encl. 1, at 3; see Army Reg. 600-8-22, ch. 1, § 1-1 ("The goal of the total Army awards program is to foster mission accomplishment by recognizing excellence * * * and motivating [individuals] to high levels of performance and service."); SECNAV Instruction 1650.1H at 3-1; AFPD para. 2. "[R]ecognizing acts of valor, heroism and exceptional duty and achievement" fosters pride in service and motivates individuals to higher achievement. *Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House Comm. on Armed Services*, 109th Cong., 2d Sess. 24 (2006) (*Awards Hearing*) (statement of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force). Military honors also confer prestige on recipients and express the Nation's gratitude for heroic acts and military service. See S. Rep. No. 240, 64th Cong., 1st Sess. 3 (1916).

In view of the importance of the military honors program, Congress and the service branches have taken

steps to guard against dilution of the reputation and meaning of the medals. These measures include publishing the names of Medal of Honor recipients and establishing the Medal of Honor Society. See 38 U.S.C. 1560; Senate Comm. on Veterans' Affairs, 93d Cong., 1st Sess., *Medal of Honor Recipients 1861-1973*, at 4-7 (Comm. Print 1973) (*Medal of Honor Report*) (explaining that false claims and other abuses necessitated various actions to "protect the dignity of the original medal"). In addition, in 1923, Congress prohibited knowingly wearing, manufacturing, or selling a military medal without authorization. See Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286.

In 2006, Congress enacted the Stolen Valor Act in response to concern that the longstanding prohibition on the unauthorized wearing and sale of medals, see 18 U.S.C. 704(a), had proved insufficient to deter false claims to have been awarded a medal. See 151 Cong. Rec. 25,769-25,770 (2005) (statement of Sen. Conrad). Section 704(b), the provision at issue in this case, makes it an offense when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded" a military decoration or medal. Congress expressly declared that the purpose of the prohibition is "to protect the reputation and meaning of military decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266. In passing the Act, Congress found that "[f]raudulent claims surrounding the receipt of [military decorations and medals] damage the reputation and meaning of such decorations and medals" and that "[l]egislative action is necessary to permit law en-

forcement officers to protect the reputation and meaning" of the medals.[2] *Ibid.*

2. a. Respondent was an elected member of the Board of Directors of the Three Valley Water District in southern California. Pet. App. 4a. On July 23, 2007, respondent stated at a public water district board meeting that he was a retired United States Marine, that he had been "wounded many times," and that he had been "awarded the Congressional Medal of Honor" in 1987. *Ibid.* Respondent has never served in the United States Armed Forces. *Ibid.*

After the Federal Bureau of Investigation obtained a recording of the July 23 meeting, the government charged respondent with two counts of "falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [respondent] knew, he had not received the Congressional Medal of Honor," in violation of 18 U.S.C. 704(b) and (c)(1). Pet. App. 5a.

b. Respondent moved to dismiss the charges on the ground that the Stolen Valor Act is invalid under the First Amendment, both facially and as applied to him. Pet. App. 141a.

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[2] In May 2011, Representative Joseph Heck introduced a bill to amend the Stolen Valor Act in the House of Representatives, and it is currently pending before the Judiciary Committee and its Subcommittee on Crime, Terrorism, and Homeland Security. See H.R. 1775, 112th Cong., 1st Sess.; 157 Cong. Rec. H3108 (daily ed. May 5, 2011). The bill would replace Section 704(b) with a new provision that makes it an offense when someone, "with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service," including misrepresentations about having received a medal or decoration, having attained a particular rank, or having served in the armed forces or a combat zone. H.R. 1775 § 2(a).

The district court denied the motion. Pet. App. 139a-144a. The court found "no dispute that [respondent] made his false statement knowingly and intentionally," *id.* at 142a, and explained that in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), this Court had held that knowingly false statements are "not protected under the First Amendment," Pet. App. 142a. Respondent's knowingly false statement, the court concluded, was not protected speech, and his as-applied challenge therefore failed. *Id.* at 142a-143a. The court also rejected respondent's facial challenge, reasoning that the Act was "narrowly written" to prohibit only "deliberate false statements concerning a very specific subject matter." *Id.* at 144a n.1. The court emphasized that the Act "does not risk chilling" truthful statements about military service because "[w]hether one actually received a military award is easily verifiable and not subject to multiple interpretations." *Ibid.*

c. Respondent pleaded guilty, reserving his right to appeal the denial of his motion to dismiss the indictment. The district court sentenced respondent to three years of probation and imposed a fine of $5000. Judgment 1.

3. a. The court of appeals reversed and remanded. Pet. App. 1a-40a. The court first held, relying on *United States* v. *Stevens*, 130 S. Ct. 1577 (2010), that "false factual speech, as a general category unto itself," does not fall within those "historical and traditional categories [of unprotected speech] long familiar to the bar." Pet. App. 15a-16a (quoting 130 S. Ct. at 1584); see *id.* at 10a-15a. The court reasoned that *Stevens*, in discussing the historically recognized categories of unprotected speech, mentioned two subsets of false speech—defamation and fraud—without suggesting that false statements, as a general category, are unprotected. *Id.* at 7a. The court

of appeals acknowledged that this Court has repeatedly stated that false speech is "not worthy of constitutional protection," *id.* at 16a (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)), but it observed that the Court has never held "that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false," *id.* at 30a-31a. Indeed, the court of appeals found "affirmative constitutional value" in some knowingly false speech, such as "[s]atirical entertainment" and hyperbole. *Id.* at 31a.

The court of appeals next concluded that Section 704(b) cannot be characterized as a regulation of the unprotected categories of defamation or fraud. The court reasoned that Section 704(b) does not "fit[] into the defamation category" because it does not prohibit only speech that is made with actual malice or knowledge of falsity and that is "injurious to a private individual." Pet. App. 22a-23a (quoting *Gertz*, 418 U.S. at 347). The court explained that even if Congress had concluded that false representations to have been awarded a medal cause "presum[ptive] * * * harm" to the meaning and effectiveness of military honors, the First Amendment does not permit the government to protect the reputation of "governmental institutions or symbols," such as military awards, "by means of a pure speech regulation." *Id.* at 24a, 25a. And the court held that the Act prohibits speech that does not constitute fraud because it reaches false statements without regard to scienter, materiality, or reliance, elements that might ensure that the regulated speech causes "bona fide harm." *Id.* at 26a-30a.

Having concluded that the speech prohibited by Section 704(b) "does not fit neatly into any of those well-defined and narrowly limited classes of speech previously considered unprotected," Pet. App. 32a (internal

quotation marks omitted), the court applied strict scrutiny, *id.* at 35a. The court acknowledged that "Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women." *Id.* at 37a. But the court concluded that Section 704(b) is not narrowly tailored because "other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud." *Id.* at 39a.

b. Judge Bybee dissented. Pet. App. 41a-90a. He explained that this Court's decisions establish that "the general rule is that false statements of fact are not protected by the First Amendment," *id.* at 46a, except in limited circumstances in which certain false statements made without scienter receive protection in order to ensure adequate "breathing space" to constitutionally protected speech, *id.* at 50a, 53a-55a. Applying that framework to Section 704(b), Judge Bybee concluded that respondent's as-applied challenge must fail because respondent did not dispute that his statements were knowingly false. *Id.* at 68a-69a.

Judge Bybee also would have held that Section 704(b) is not facially overbroad. He reasoned that the Act's prohibition of self-aggrandizing lies does not deter protected expression, even if the Act is interpreted not to contain a scienter requirement, because mistaken claims to have won a medal "will be extraordinarily rare if not nonexistent." Pet. App. 84a. Judge Bybee also argued that Section 704(b)'s prohibition on falsely "represent[ing]" to have been awarded a medal indicates that the Act extends only to statements that can be interpreted as statements of fact, not ambiguous statements, hyperbole, or satire. *Id.* at 82a-83a, 87a-90a. He

therefore concluded that Section 704(b) was free from "any potential overbreadth" and that in any event, any overbreadth was not substantial. *Id.* at 90a.

4. The government petitioned for rehearing en banc. The court of appeals denied rehearing in a published order. Pet. App. 91a-138a. Judge Milan Smith, joined by Chief Judge Kozinski, authored an opinion concurring in the denial of rehearing en banc, in which Judge Smith reiterated the reasoning of the panel majority's opinion. *Id.* at 92a-106a.

Chief Judge Kozinski also authored a separate concurrence, in which he noted that lies about oneself are commonplace in day-to-day social interactions. Pet. App. 107a-115a. In his view, a First Amendment doctrine that did not protect false statements of fact would be "terrifying," because it would permit censorship by "the truth police" of "the white lies, exaggerations and deceptions that are an integral part of human intercourse." *Id.* at 107a-108a.

Judge O'Scannlain, joined by six other judges, dissented from denial of rehearing en banc. Pet. App. 116a-135a. Judge O'Scannlain argued that the panel opinion "runs counter to nearly forty years of Supreme Court precedent," including the Court's decisions on defamation and baseless lawsuits. *Id.* at 116a (emphasis omitted); see *id.* at 118a-125a. That precedent, he explained, established that false statements of fact receive only the derivative protection necessary to ensure that "constitutionally protected non-false speech" is not inhibited. *Id.* at 119a. Judge O'Scannlain therefore argued that "restrictions upon false speech do not receive strict scrutiny," but rather, they are evaluated to determine whether they provide sufficient breathing space for protected speech. *Id.* at 119a-120a. Judge O'Scannlain

reasoned further that the panel majority had erred in concluding that the First Amendment required the criminal prosecution of false statements to be based on a showing of individualized harm, *id.* at 129a-131a, but in any event, all false claims of military awards contribute to the reputational and other harms Congress identified in passing Section 704(b), *id.* at 132a-133a.

Judge Gould, who joined Judge O'Scannlain's dissent, also authored a separate dissent. Pet. App. 135a-138a. He argued that it was "improper to apply strict scrutiny to invalidate this law on its face" in view of Congress's broad power over military affairs and the "lack of any societal utility in tolerating false statements of military valor." *Id.* at 136a. Judge Gould would have held that "Congress's criminalization of making false statements about receiving military honors is a carefully defined subset of false factual statements not meriting constitutional protection." *Id.* at 137a (internal quotation marks omitted).

SUMMARY OF ARGUMENT

Section 704(b) validly prohibits a narrow category of knowingly false factual representations that undermines the capacity of military awards to confer honor on their recipients and to foster morale and esprit de corps within the armed forces. The provision is the most recent of Congress's historical efforts to protect the military awards system against false claims and unauthorized imitations that misappropriate the awards' value and undercut their utility. Section 704(b) furthers this compelling interest by prohibiting only knowingly false representations of fact, which receive, at most, limited protection under the First Amendment when necessary to avoid chilling fully protected speech. The provision

does not restrict expression of opinion about military policy, the meaning of military awards, the values they represent, or any other topic of public concern. Nor does the provision chill such speech. The court of appeals was wrong to hold that Section 704(b) is unconstitutional.

I. Properly construed, Section 704(b) prohibits a discrete and narrow category of factual statements: knowingly false representations that a reasonable observer would understand as a factual claim that the speaker has been awarded a military honor.

II. This Court has repeatedly stated that knowingly false statements of fact are "unprotected for their own sake." *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 531 (2002). False statements are entitled, at most, only to a limited "measure of strategic protection" that derives from the need to ensure that any false-speech restriction does not chill truthful and other fully protected speech. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). The Court has therefore held that content-based restrictions on false factual statements are consistent with the First Amendment if they are supported by a strong government interest and provide adequate "breathing space" for fully protected speech. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). In determining whether a restriction provides adequate breathing space, the Court has examined whether the restriction includes a scienter requirement and other elements that ensure that speakers will not be deterred from engaging in truthful speech. See *Gertz*, 418 U.S. at 340-344. When the restriction potentially chills some protected speech, the Court has additionally considered whether the restriction "extends no further than" necessary to

protect the government interest at issue. *Id.* at 348-349. Because this Court has applied this analysis in every context in which it has addressed false factual statements, the court of appeals was wrong to assume that Section 704(b) should be subject to strict scrutiny.

That conclusion is reinforced by Congress's long-established practice of restricting a broad variety of knowingly false factual statements in order to protect the integrity of important governmental programs. See, *e.g.*, 18 U.S.C. 1001. The Court has never suggested that these statutes, many of which do not require the government to prove intent to deceive or actual harm, may impinge on First Amendment concerns unless they are the least restrictive means of achieving a compelling government interest.

III. Under the "breathing space" analysis that this Court has applied to restrictions on false factual statements, Section 704(b) is constitutional. The government has a strong—indeed, compelling—interest in protecting the reputation and integrity of its military honors system against knowingly false claims. Military awards serve as public symbols of honor and prestige, conveying the Nation's gratitude for acts of valor and sacrifice; and they foster morale, mission accomplishment, and esprit de corps within the military. False claims to have received military awards undermine the system's ability to fulfill these purposes. In the aggregate, false claims make the public skeptical of all claims to have received awards, and they inhibit the government's efforts to ensure that the armed services and the public perceive awards as going to only the most deserving few.

Section 704(b) appropriately accommodates the government's compelling interest and First Amendment concerns by providing ample breathing room for pro-

tected speech. Section 704(b) prohibits a narrow category of knowing, objectively verifiable false representations, about which a person is unlikely to be mistaken. Prohibiting those false statements poses little risk of chilling any protected speech or allowing the government to punish disfavored viewpoints or act as the arbiter of truth and falsity on matters subject to public debate. The provision is therefore valid. Even assuming that Section 704(b) risked deterring some protected speech, the restriction is constitutional because it extends no further than necessary to address the cumulative harm caused by false claims. Relying on public discovery and refutation of such claims would be inadequate to prevent the harm targeted by the statute.

IV. Even if the court of appeals was correct to apply strict scrutiny, Section 704(b) is constitutional. The provision serves a compelling interest. Congress, having historically protected the military awards system from misappropriation and dilution, determined that prohibiting knowing misrepresentations is necessary to ensure that the awards continue to serve their important purposes, and Section 704(b) represents the least restrictive means of achieving that end.

ARGUMENT

I. SECTION 704(b) PROHIBITS ONLY KNOWINGLY FALSE STATEMENTS THAT REASONABLY CAN BE UNDERSTOOD AS ASSERTIONS OF FACT

The "first step" in First Amendment analysis is "to construe the challenged statute." *United States* v. *Williams*, 553 U.S. 285, 293 (2008). Section 704(b) makes it an offense when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded" a military decoration or medal. Properly construed, the

provision reaches a discrete and narrow category of statements: knowingly false representations that a reasonable observer would understand as making the factual claim that the speaker has been awarded a military honor.

Although Section 704(b) does not use the term "knowing" or "knowingly," its prohibition on "falsely represent[ing]" that one has received a military award requires knowledge of falsity. To "represent" something is "[t]o place (a fact) clearly before another; to state or point out explicitly or seriously to one, with a view to influencing action or conduct." See 13 *Oxford English Dictionary* 657 (2d ed. 1989) (*Oxford*); see also *Black's Law Dictionary* 1415 (9th ed. 2009) (*Black's*) (a "representation" is made "to induce someone to act"). A "false representation," also known as a "misrepresentation," is "[t]he act of making a false or misleading assertion about something, usu[ally] with the intent to deceive." *Id.* at 1091. Thus, the phrase "falsely represents" connotes making a factual assertion with the knowledge that it is false. See Stolen Valor Act, § 2(1), 120 Stat. 3266 (congressional findings referring to "[f]raudulent claims surrounding the receipt" of awards). That interpretation is buttressed by the presumption that, absent contrary evidence of congressional intent not present here, criminal statutes contain a mens rea requirement even when the statute is silent on that issue.[3] See, *e.g.*,

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[3] Section 704(a), which has existed in substantially its present form since 1948, see Act of June 25, 1948, ch. 645, § 704, 62 Stat. 732, prohibits "knowingly wear[ing]," or engaging in certain transactions concerning, any decoration or medal except as authorized by regulation. 18 U.S.C. 704(a). The fact that Section 704(a) contains an explicit scienter requirement does not suggest that Congress intended to omit a knowledge requirement in Section 704(b), given that the two provisions

Staples v. *United States*, 511 U.S. 600, 605-606 (1994); *Morissette* v. *United States*, 342 U.S. 246, 250 (1952).

Similarly, the statutory term "represent" excludes parody, satire, hyperbole, performances, and any other statements that cannot reasonably be understood as factual claims. See *Oxford* 657; *Black's* 1415 ("representation" is a "presentation of fact"); *id.* at 1091 (a misrepresentation is a "false assertion of fact" (quoting Restatement (Second) of Contracts § 159 cmt. a, at 426 (1979)). In enacting Section 704(b), Congress found that "[f]raudulent claims surrounding the receipt" of military medals threaten the reputation of the medals. See Stolen Valor Act, § 2(1), 120 Stat. 3266. Nothing suggests that Congress sought to prohibit statements about having received a medal that would be understood as fictional or hyperbolic rather than as "claims" to have actually received a medal. See *Watts* v. *United States*, 394 U.S. 705, 705, 708 (1969) (per curiam) (interpreting prohibition on knowingly making "any threat" to harm the President as excluding "political hyperbole" in the absence of any evidence of contrary congressional intent); Pet. App. 87a-90a (Bybee, J., dissenting).

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were enacted over 50 years apart. See *Johnson* v. *United States*, 130 S. Ct. 1265, 1272-1273 (2010). In any event, Section 704(b)'s use of the phrase "falsely represents" connotes knowledge.

II. KNOWINGLY FALSE FACTUAL STATEMENTS ARE ENTITLED AT MOST TO LIMITED FIRST AMENDMENT PROTECTION, AND THEY MAY ACCORDINGLY BE RESTRICTED SO LONG AS THE RESTRICTION SERVES AN IMPORTANT GOVERNMENT INTEREST AND PROVIDES ADEQUATE BREATHING SPACE TO FULLY PROTECTED SPEECH

This Court has long held that knowingly false statements of fact like those prohibited by Section 704(b) are entitled, at most, only to limited First Amendment protection, and only to the extent necessary to ensure that restrictions on false factual statements do not unduly inhibit fully protected speech. Accordingly, the Court has repeatedly upheld content-based restrictions on such statements without applying strict scrutiny. Instead, the Court has examined whether the restriction in question is supported by an important government interest and properly accommodates First Amendment concerns by providing adequate "breathing space" for fully protected speech. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964) (citation omitted).

A. Knowingly False Statements Of Fact Are Entitled At Most To Limited First Amendment Protection

In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), the Court explained that "[c]alculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas." *Id.* at 75 (citation and internal quotation marks omitted). Since then, the Court has frequently reiterated the principle that false factual statements have no First Amendment value in themselves. See, *e.g.*, *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 531 (2002) (stating that "false statements [are] unprotected for their own sake"); *Hustler Magazine, Inc.*

v. *Falwell*, 485 U.S. 46, 52 (1988) (*Hustler*) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas."); *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that "there is no constitutional value in false statements of fact," because such statements do not "materially advance[] society's interest in 'uninhibited, robust, and wide-open debate' on public issues") (quoting *New York Times*, 376 U.S. at 270).

Accordingly, this Court's First Amendment decisions have long recognized that false factual statements "are not protected by the First Amendment in the same manner as truthful statements." *Brown* v. *Hartlage*, 456 U.S. 45, 60-61 (1982) (citation omitted); see also, *e.g.*, *BE&K Constr. Co.*, 536 U.S. at 531; *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function."). Although the broad general category of false factual statements has not historically been treated as completely unprotected by the First Amendment, see *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (requiring a "long * * * tradition of proscription" for a category of speech to be wholly unprotected); *United States* v. *Stevens*, 130 S. Ct. 1577, 1584 (2010), the Court has repeatedly stated, in numerous contexts, that false factual statements do not receive First Amendment protection for their own sake. See, *e.g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (*Virginia State Bd.*) ("Untruthful speech, commercial or

otherwise, has never been protected for its own sake."); see also *BE&K Constr. Co.*, 536 U.S. at 531 (stating that false statements are "unprotected for their own sake").

Rather, false factual statements are protected only to the extent needed to avoid chilling fully protected speech. As this Court has recognized, "erroneous statement[s] of fact" are "inevitable in free debate" respecting public issues. *Gertz*, 418 U.S. at 340. Consequently, in certain circumstances, punishing or imposing liability for all false factual statements could inhibit a speaker from voicing his view, "even though [he] believe[s] [it] to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times*, 376 U.S. at 279. To avoid this possibility, false statements of fact receive "a measure of strategic protection" in appropriate contexts, in order to ensure that regulation of such statements does not unduly inhibit fully protected speech. *Gertz*, 418 U.S. at 342; see *id.* at 341.

B. This Court Has Approved Content-Based Restrictions On False Statements Of Fact In A Variety Of Contexts Without Applying Strict Scrutiny

1. The Court has consistently applied the breathing space approach to various restrictions on false factual statements

Because false factual statements are entitled only to limited instrumental protection, the Court has never applied strict scrutiny to a restriction on such statements. Rather, it has approved content-based restrictions on false factual statements outside the commercial context when the restriction in question is supported by a strong government interest and provides adequate

"breathing space" for fully protected speech.[4] See *New York Times*, 376 U.S. at 272 (citation omitted).

The Court has held that the First Amendment permits false-statement restrictions in a variety of contexts, including defamation, see *New York Times*, 376 U.S. at 272; fraud, see *Illinois, ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); intentional infliction of emotional distress through false statements, see *Hustler*, 485 U.S. at 53, 56; and false-light invasion of privacy, see *Hill*, 385 U.S. at 388-389. The Court has also applied the "breathing space" analysis to a state law directed at campaign statements. *Hartlage*, 456 U.S. at 60-61. It has additionally held that liability for filing a baseless lawsuit—a kind of false factual statement—is treated analogously to the "breathing space" approach. See *BE&K Constr. Co.*, 536 U.S. at 531.

The Court has examined whether each of these restrictions serves a strong government interest and chills fully protected speech. When the restriction has little if any chilling effect, the Court has upheld the restriction. See *Telemarketing Assocs.*, 538 U.S. at 619. When the restriction potentially chills some protected speech, the Court has additionally considered whether the restriction "extends no further than" necessary to protect the government interest at issue. *Gertz*, 418 U.S. at 348-349.

a. Defamation

The Court has most often addressed content-based restrictions on false factual statements in the context of of state-law tort actions for defamation, and it is in that

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[4] In the distinct context of commercial speech, the government has wider latitude to regulate speech that is not literally false, but nonetheless deceptive and misleading. See *Virginia State Bd.*, 425 U.S. at 771-772 & n.24.

context that the Court has most fully explicated the "breathing space" approach. The Court has explained that although "there is no constitutional value in false statements of fact" such as defamation, *Gertz*, 418 U.S. at 340, defamation tort actions risk deterring legitimate speech, including truthful statements and criticism of the government. *New York Times*, 376 U.S. at 279. The First Amendment therefore protects some defamatory statements in order to "avoid self-censorship by the news media." *Gertz*, 418 U.S. at 341.

Although the most effective way to avoid any chilling effect from restrictions on defamation would be to create "an unconditional and indefeasible immunity from liability for defamation," the Court has recognized that First Amendment principles are "not the only societal value at issue." *Gertz*, 418 U.S. at 341; see *Time, Inc.* v. *Firestone*, 424 U.S. 448, 456 (1976). Rather, the State has a "strong and legitimate" interest in compensating individuals for injury to reputation, and that interest necessitates "defin[ing] the proper accommodation between the[] competing concerns" engendered by the First Amendment and the state interest in limiting defamatory speech. *Gertz*, 418 U.S. at 342, 348; *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 22 (1990) ("[T]here is also another side to the equation; we have regularly acknowledged * * * that society has a pervasive and strong interest in preventing and redressing attacks on reputation.") (internal quotation marks and brackets omitted). "[T]he proper accommodation," the Court has held, allows States to remedy the harms from defamation through private tort actions while "assur[ing] to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz*, 418 U.S. at 342 (citation omitted); *New York Times*, 376 U.S. at 272.

To provide the necessary "breathing space," the Court has imposed several limitations on defamation actions. See *Milkovich*, 497 U.S. at 12-17. Most importantly, the Court has held that a scienter requirement is necessary to protect against the chilling effect of a defamation action. Public-figure defamation suits are therefore consistent with the First Amendment if the plaintiff must prove knowledge of falsity or actual malice. See *New York Times*, 376 U.S. at 279-280; *Gertz*, 418 U.S. at 342, 347. The defamation plaintiff also must bear the burden of proving both falsity and fault by clear and convincing evidence. See *Milkovich*, 497 U.S. at 15-16.

While these protections are deemed necessary in public-figure defamation actions to safeguard First Amendment rights, the state's "greater" interest in protecting private individuals from defamation justifies a standard of fault that is less rigorous. *Gertz*, 418 U.S. at 344. Private plaintiffs may therefore recover for negligently false and defamatory statements. *Id.* at 346-347; see *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 774 (1986). In view of the lowered scienter requirement, the Court held that it was "appropriate to require that state remedies * * * reach no farther than is necessary to protect" the state interest involved in private-plaintiff cases, in order to ensure that defamation actions do not "unnecessarily * * * inhibit the vigorous exercise of First Amendment freedoms." *Gertz*, 418 U.S. at 349. The Court therefore held that the state interest in compensating defamation-related injury to private individuals did not justify presumed and punitive damages for negligently false statements—because those remedies would "unnecessarily exacerbate[]" the chilling effect. *Id.* at 350.

b. False-light invasion of privacy

Three years after applying the "breathing space" approach to defamation actions in *New York Times*, the Court extended the analysis to false factual statements that invade an individual's privacy by placing him in a "false light." See *Hill*, 385 U.S. at 388-390.

In *Hill*, the Court addressed a New York statute that gave "newsworthy person[s]" a right to damages "when his or her name, picture or portrait was the subject of a 'fictitious' report or article" that contained "[m]aterial and substantial falsification[s]." *Cantrell* v. *Forest City Publ'g Co.*, 419 U.S. 245, 249 (1974); *Hill*, 385 U.S. at 381, 383-384, 386. The Court began by emphasizing the distinct character of the false-light cause of action, observing that unlike defamation, it did not arise out of a long common-law tradition. *Hill*, 385 U.S. at 380-381 & n.3. Because the government "interest at issue is privacy rather than reputation and the right claimed is to be free from the publication of false or misleading information about one's affairs," *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975), the statements giving rise to a false-light action "need not be defamatory" in nature. *Hill*, 385 U.S. at 385 n.9; see 3 Restatement (Second) of Torts § 652E, at 394 (1976). As a result, the Court explained that "the content of the speech itself [may] afford[] no warning of prospective harm to another through falsity." *Hill*, 385 U.S. at 389; see *Cantrell*, 419 U.S. at 251 n.3.[5]

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[5] The court of appeals therefore erred in assuming that *Hill* and *Cantrell* represent no "more than a variation on defamation jurisprudence." Pet. App. 21a n.10.

Because false-light and defamation actions raised similar concerns about chilling protected speech, the Court held that the "breathing space" analysis established in *New York Times* should also be applied to false-light torts. *Hill*, 385 U.S. at 388-391. Observing that "the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function," the Court held that requiring false-light plaintiffs to prove a "knowing or reckless falsehood" would provide adequate breathing space. *Id.* at 389-390. That standard was necessary to ensure that false-light claims did not chill protected speech, the Court held, because the speech that could give rise to a false-light action might appear innocuous on its face. *Id.* at 389; *Cantrell*, 419 U.S. at 249.

c. Intentional infliction of emotional distress

The Court also has extended the "breathing space" approach to public-figure actions for intentional infliction of emotional distress based on false factual statements. See *Hustler*, 485 U.S. at 53, 56. In holding that the State may permit appropriately cabined emotional-distress actions premised on false statements, the Court rejected the plaintiff's argument that the "breathing space" analysis was inapplicable because the "State seeks to prevent not reputational damage, but the severe emotional distress suffered by the person who is the subject of an offensive publication." *Id.* at 52. Rather, the Court explained, while States had an "understandable" interest in prohibiting outrageous conduct that is intended to cause emotional distress, *id.* at 53, because of the tort's potential chilling effect on provocative speech and the subjective nature of the determination whether such speech was sufficiently outra-

geous to warrant liability, an actual-malice scienter requirement was necessary to provide "adequate 'breathing space' to the freedoms protected by the First Amendment," *id.* at 56. That conclusion, the Court emphasized, was "not merely a 'blind application' of the *New York Times* standard," but a "considered judgment that such a standard is necessary" in the context of false statements that inflict emotional distress. *Ibid.*

d. Fraud

The Court has long held that the government may restrict fraud, observing that the interest in preventing and punishing fraud "has always been recognized in this country and is firmly established." *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 190 (1948). Analogizing to the defamation context, the Court has explained that elements such as scienter, materiality, and reliance "provide sufficient breathing room for protected speech." *Telemarketing Assocs.*, 538 U.S. at 620. These ensure that civil fraud prohibitions do not chill fully protected speech and "properly tailor[]" the limitations to serve the government's interest in protecting the integrity of transactions and compensating injury. See *ibid.*

e. Demonstrably false campaign promises

The Court has also applied the "breathing space" analysis to the application of a state prohibition on offering voters consideration in return for their votes to a candidate who promised not to draw a salary if elected. *Hartlage*, 456 U.S. at 60-61. Because state law would not have allowed the candidate to refuse a salary if elected, the State argued that the statute should be upheld as a prohibition on a false factual statement. The Court agreed with the State that "demonstrable falsehoods are not protected by the First Amendment in the

same manner as truthful statements," but it held that the statute, "as applied in this case, has not afforded the requisite 'breathing space.'" *Ibid.* The statute did not contain a scienter requirement, and therefore imposed "absolute accountability for factual misstatements," creating an unacceptable chilling effect. *Id.* at 61. That significant burden on protected speech could not be justified in light of the "special force" of effective counter-speech in the campaign context and the weakness of the state interest in imposing strict liability for such statements. *Ibid.*

f. Liability for baseless lawsuits

Finally, the Court has treated objectively baseless lawsuits as "analogous to false statements," *BE&K Constr. Co.*, 536 U.S. at 530-531 (internal quotation marks and citation omitted), and it has stated that its treatment of such suits is "consistent with * * * 'breathing space' principles." *Id.* at 531. In recognition of the "strong federal interest in vindicating the rights protected by the national labor laws" and in protecting against anticompetitive lawsuits, *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 743-744 (1983); *BE&K Constr. Co.*, 536 U.S. at 528, the Court has upheld the application of the National Labor Relations Act and the Sherman Act to prohibit objectively baseless lawsuits motivated by an unlawful purpose. At the same time, although such suits "may advance no First Amendment interests of their own," the Court has explained that the requirement of an unlawful purpose is analogous to a "breathing space" requirement. *BE&K Constr. Co.*, 536 U.S. at 531. That requirement properly "balances the risk of anticompetitive lawsuits against the chilling effect on First Amendment petitioning" that

would otherwise be caused by the threat of liability. *Id.* at 528 (internal quotation marks omitted).

2. The Court's decisions establish the attributes of a constitutionally permissible restriction on false factual statements

The Court has consistently applied the breathing space analysis—rather than strict scrutiny—to content-based restrictions on specific types of false factual statements. These decisions thus establish the Court's approach to false factual statements as a general matter. In each case, the Court has emphasized that the government has a strong interest in restricting the false statements at issue. See *Gertz*, 418 U.S. at 341; see also *Milkovich*, 497 U.S. at 22-23. Identifying such an interest also helps uncover efforts to burden disfavored speech by regulating false speech that is unconnected to any identified harm. The Court has then examined whether the restriction risks chilling protected speech. In this respect, a scienter requirement is an important safeguard, as are other elements that enable speakers to reasonably differentiate between actionable and non-actionable statements without forgoing truthful speech or legitimate debate. See *Hill*, 385 U.S. at 389-390. Finally, when the restriction chills some protected speech, the Court has also considered whether the restriction does not extend "farther than is necessary to protect" the government interest at stake. *Gertz*, 418 U.S. at 348-349.

C. Congress Has Enacted Numerous Statutes Prohibiting False Statements Of Fact, And This Court Has Never Suggested That Such Statutes Would Be Invalid Unless They Were Able To Withstand Strict Scrutiny

Congress has long restricted a broad variety of knowingly false factual statements in order to protect the integrity of important governmental programs. The longstanding assumption that these statutes are valid buttresses the conclusion that the government may regulate false factual statements without being subject to searching First Amendment scrutiny. The most frequently used of these statutes do not require the government to prove intent to deceive or defraud, or, in many cases, actual harm resulting from the statements. Yet despite the prevalence and breadth of these statutes, they have rarely—if ever—been subject to challenge on First Amendment grounds, and the Court has never suggested that they may impinge on First Amendment concerns unless they are narrowly tailored to a compelling government interest.

1. The most prominent federal false-statements statute, 18 U.S.C. 1001(a), prohibits "knowingly and willfully" making any "materially false, fictitious, or fraudulent statement or representation" in "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." As originally enacted in 1918, Section 1001 prohibited false statements made with intent to defraud—*i.e.*, to cause pecuniary or property loss to—the government. *United States* v. *Yermian*, 468 U.S. 63, 70-71 (1984). As a result of concern that the statute was "insufficient to protect the authorized functions of federal agencies from a variety of deceptive practices," Congress amended it in 1934 to remove the requirement of deceptive intent. *Id.* at 71.

Section 1001 also does not require a showing of any actual "pecuniary or property loss to the government"; rather, it protects "agencies from the perversion which *might* result from the deceptive practices described." *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941) (emphasis added). This Court has construed Section 1001 on multiple occasions, reviewing its history in considerable detail, but has never suggested that its broad prohibition infringes on the First Amendment. *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984); see *Brogan* v. *United States*, 522 U.S. 398, 400-406 (1998); *Hubbard* v. *United States*, 514 U.S. 695, 703-708 (1995); *Yermian*, 468 U.S. at 70-74; *United States* v. *Bramblett*, 348 U.S. 503, 504-508 (1955); *Gilliland*, 312 U.S. 86, 91-95.

In addition, the federal offense of perjury prohibits knowingly making a false material statement under oath in connection with a judicial or grand jury proceeding. 18 U.S.C. 1623; 18 U.S.C. 1621; *e.g.*, Act of Apr. 30, 1790, ch. 9, § 18, 1 Stat. 116; see *United States* v. *Dunnigan*, 507 U.S. 87, 94-95 (1993); *United States* v. *Debrow*, 346 U.S. 374, 376-377 (1953). As with Section 1001, perjury does not require a showing of intent to mislead or resulting harm to the tribunal or inquiry. See *ibid.*; *Brogan*, 522 U.S. at 402 & n.1. The Court has repeatedly considered the scope of perjury statutes, see, *e.g.*, *Debrow*, *supra*, but it has never suggested that they impinge on First Amendment concerns.[6] Cf., *e.g.*, *Konigsberg* v.

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[6] In addition to Section 1001 and perjury, more than a hundred other federal criminal statutes penalize making false statements in connection with various areas of federal agency concern. See, *e.g.*, 18 U.S.C. 922(a)(6), 924(a)(1)(A) (knowingly false statements with respect to information required by firearms regulations); 22 U.S.C. 2778(c) (Supp. IV 2010) (willfully "untrue" statement on report required for control of arms exports and imports); 18 U.S.C. 1015 (knowingly false statements

State Bar, 366 U.S. 36, 49 n.10 (1961) (absolutist view of First Amendment "cannot be reconciled with the law relating to libel, slander, misrepresentation, [and] perjury"); *Spence* v. *Washington*, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (providing perjury as example of speech that may be prohibited when "important countervailing interests are involved").

2. Congress has also enacted numerous statutes that prohibit falsely representing that one is speaking on behalf of, or with the approval of, the government.[7] Some of these statutes are premised on Congress's determination that a false representation of association with the government misappropriates and dilutes the government's authority. For instance, Congress has long prohibited false impersonation of a federal officer or employee, including falsely stating that one is a federal officer. See 18 U.S.C. 912 ("Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any depart-

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related to citizenship and naturalization); 18 U.S.C. 1027 (knowingly false statements in records required by ERISA); 20 U.S.C. 1097(b) (knowingly false statements in connection with assignment of federally insured student loan); 18 U.S.C. 911 (falsely claiming citizenship); 42 U.S.C. 1973i(c) (knowingly false statement for the purpose of establishing eligibility to vote); see also *United States* v. *Wells*, 519 U.S. 482, 505-507 & nn.8-10 (1997) (Stevens, J., dissenting) (citing "at least 100 federal false statement statutes" in the United States Code).

[7] See, *e.g.*, 18 U.S.C. 709 (knowingly using, without authorization, the names of enumerated federal agencies, such as "Federal Bureau of Investigation" and "Drug Enforcement Administration," in a manner reasonably calculated to convey the impression that a communication is approved or authorized by the agency); 18 U.S.C. 712 (using the words "national," "Federal," and "United States" in the collection of private debts for the purpose of conveying that the communication is from or on behalf of the United States).

ment, agency or officer thereof, and acts as such" shall be prosecuted); *United States* v. *Parker*, 699 F.2d 177, 178-180 (4th Cir.) (upholding conviction where defendant falsely stated that he was an IRS agent, but lacked fraudulent intent and did not receive anything of value), cert. denied, 464 U.S. 836 (1983). This Court has recognized that Congress's purpose in enacting the statute was not only preventing fraud, but also "maintain[ing] the general good repute and dignity" of government service, and as a result, fraudulent intent and an "actual financial or property loss" are not required elements. *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943) (citation omitted); *United States* v. *Bushrod*, 763 F.2d 1051, 1052-1054 (9th Cir. 1985) (per curiam).

Similarly, Congress has prohibited knowingly using terms associated with the Social Security Administration (SSA) in a manner that is intended to convey a false impression of government endorsement in order to protect the government's ability to communicate with Social Security recipients. 42 U.S.C. 1320b-10(a). The Fourth Circuit has rejected a First Amendment challenge to the statute—without applying strict scrutiny—on the ground that it is appropriately tailored to the government's interest in protecting legitimate SSA communications against dilution and false claims of government endorsement. See *United Seniors Ass'n* v. *SSA*, 423 F.3d 397, 407 (2005), cert. denied, 547 U.S. 1162 (2006).

3. This multitude of statutes reflects long acceptance of the government's power to prohibit specific false factual statements to protect the integrity of its regulatory programs, judicial proceedings, and other functions. This Court has recognized that Congress may reasonably conclude that certain types of false factual statements, even those made without fraudulent intent,

are likely to cause harm to the government's important interests, and that, as a result, these statutes need not require deceptive intent, materiality, or actual harm. See, *e.g.*, *Brogan*, 522 U.S. at 401-404; *id.* at 402 (rejecting the argument that "only those falsehoods that pervert governmental functions are covered by § 1001"); *Wells*, 519 U.S. at 489-491 (holding that materiality of falsehood is not an element under 18 U.S.C. 1014). The long tradition of congressional regulation of false factual statements to protect governmental functions, and the absence of First Amendment concerns despite the breadth of these statutes, is inconsistent with the notion that the First Amendment ordinarily requires that false-statement restrictions be subjected to strict scrutiny.

D. Against This Backdrop, The Court Of Appeals Was Wrong To Apply Strict Scrutiny To Section 704(b)

The court of appeals' conclusion that restrictions on false statements of fact are subject to strict scrutiny cannot be reconciled with this Court's longstanding treatment of false factual statements as subject to regulation and the historical acceptance of federal prohibitions on false statements.

In deciding to apply strict scrutiny to Section 704(b), the court of appeals relied heavily on this Court's statement in *Stevens* that the "historic and traditional categories" of speech that may be punished without "Constitutional problem," "includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." 130 S. Ct. at 1584 (citations omitted); see also *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2734; Pet. App. 7a-8a. In the court of appeals' view, the *Stevens* Court's inclusion of "defamation" and "fraud" in its recitation of categories of wholly unprotected speech, and its failure to

include the general category of "false factual statements" in the same list, indicate that defamation and fraud are the only two types of false statements that may be restricted—and, by implication, that any false factual statement that cannot be characterized as defamation or fraud must be entitled to full First Amendment protection and cannot be subject to regulation unless the government meets the requirements of strict scrutiny. See Br. in Opp. 10-11. That is incorrect.

Stevens concerned the question whether the Court should create a new category of completely unprotected speech, 130 S. Ct. at 1585, and so the Court first canvassed categories of speech that had historically enjoyed that status. As *Stevens* explained, defamation and fraud were historically treated as completely unprotected by the First Amendment. *Id.* at 1584. Once a statement was characterized as defamatory or intentionally deceptive, it could be prohibited, or made the subject of a damages action, without any First Amendment limitation or scrutiny. See *New York Times*, 376 U.S. at 268. Because regulation of other false factual statements had a different historical pedigree, it is unsurprising that the *Stevens* Court did not include them in its enumeration of categories of speech that have historically been treated as wholly unprotected. See 130 S. Ct. at 1584.

But it does not follow from *Stevens*'s inclusion of defamation and fraud among the categories of historically unprotected speech that all other types of false factual statements must be regarded as fully protected. Despite the historical treatment of defamation as completely unprotected, in the 1960s the Court began to treat defamatory statements as entitled to derivative First Amendment protection arising from the need to avoid chilling fully protected speech. See *New York*

Times, 376 U.S. at 271-272. Similarly, the Court has recently explained that restrictions on fraud are permissible not only because fraud is unprotected, but because the traditional elements of fraud provide adequate breathing space for fully protected speech. See *Telemarketing Assocs.*, 538 U.S. at 612, 620-621. Thus, although defamation and fraud are historically unprotected categories of speech, today the Court views content-based restrictions on both categories through the lens of the "breathing space" analysis.

The Court has also made clear that this analysis applies more broadly, to false factual statements in general. Although the Court developed the breathing space approach in the context of defamation, in extending the analysis to new contexts the Court has reasoned from the premise that "*false statements* [are] unprotected for their own sake." *BE&K Constr. Co.*, 536 U.S. at 531 (emphasis added). Accordingly, the Court has not hesitated to apply the breathing space analysis to categories of false factual statements—such as false-light invasion of privacy and intentional infliction of emotional distress—that it understood to be distinct from defamation. See pp. 24-28, *supra*. And the Court has never questioned the government's authority to enforce laws against perjury, false statements, and false claims to be representing federal government agencies, even though none of those regulations fell within the categories *Stevens* identified. Thus, today defamation and fraud are best understood as subsets of the larger category of false factual statements that the Court has held may be subject to content-based restrictions that serve an important government interest and do not unduly chill fully protected speech.

Stevens's specific reference to defamation and fraud in its enumeration of long-recognized categories of wholly unprotected speech thus acknowledged the historical treatment of defamation and fraud. The *Stevens* Court had no occasion to consider the relationship of defamation and fraud to the Court's treatment of false factual statements more generally and its development of a single approach to apply to all such statements. Contrary to the court of appeals' view, then, *Stevens*'s mention of defamation and fraud does not implicitly overrule its previous extension of the "breathing space" analysis to uphold a variety of restrictions on other distinct types of false factual statements. Nor should *Stevens* be read to suggest that the numerous longstanding statutory prohibitions on false factual statements that do not constitute defamation or fraud are invalid unless they survive strict scrutiny.

III. SECTION 704(b) SERVES A COMPELLING INTEREST AND PROVIDES ADEQUATE BREATHING SPACE TO FULLY PROTECTED SPEECH, AND IT IS THEREFORE CONSTITUTIONAL

Under the "breathing space" analysis that this Court has applied to restrictions on false factual statements, Section 704(b) is constitutional. The government has a strong—indeed, compelling—interest in protecting the reputation and integrity of its military honors system against knowingly false claims. Section 704(b)'s narrow prohibition on a discrete category of knowing, verifiably false representations poses no risk of chilling any protected speech. Nor would the provision provide a vehicle for the government to punish disfavored viewpoints or act as the arbiter of truth and falsity in public debate. Section 704(b) therefore appropriately accommodates

the government's interest and First Amendment concerns by providing ample breathing room for protected speech. And even if Section 704(b) did risk chilling some protected speech, such that a further inquiry into whether the prohibition extends further than necessary might be appropriate, the statute prohibits only the narrow category of knowing misrepresentations that is necessary to protect the government's interest.

A. The Government Has A Compelling Interest In Protecting The Integrity Of The Military Honors System

1. The government has a "compelling interest * * * in preserving the integrity of its system of honoring our military men and women." Pet. App. 37a. The military honors program serves two vital and related interests.

First, military medals and decorations serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service. The government intends military honors to bestow prestige on their bearers and convey to the public the high regard in which the government holds the individuals who have sacrificed in service to the Nation. Valor awards educate the public about acts of courage and sacrifice during armed conflict, thereby fostering public support for the individuals serving in the armed forces. See *Awards Hearing* 72 (Defense Department honors program "foster[s] * * * public acknowledgment of our Service member's actions, achievements and sacrifices"); *Medal of Honor Report* 2 (the Medal of Honor was developed in part to inform the public about, and provide recognition for, the sacrifices involved in what might otherwise be seen as obscure and far-away conflicts). Non-valor awards—such as the Combat Infantryman Badge, which was intended as a mark of pres-

tige recognizing the dangers faced by infantrymen who have participated in active ground combat, see Army Reg. 600-8-22, ch. 8, § 8-6—also express the government's appreciation and convey to the public the high degree of skill and dedication that the person has displayed in military service.

Second, military awards, by "recognizing acts of valor, heroism and exceptional duty and achievement," serve vital purposes within the armed services. *Awards Hearing* 24 (statement of Lt. Gen. Roger A. Brady, Deputy Chief of Staff, Manpower and Personnel, Headquarters, U.S. Air Force). The military awards program "fosters morale, mission accomplishment and esprit de corps" among service members. *Ibid.*; see *id.* at 26 (statement of Brig. Gen. Richard P. Mills, Dir., Personnel Mgmt. Div., Manpower and Reserve Affairs, HQ, U.S. Marine Corps) (emphasizing the "importance of a viable and robust military combat awards system in maintaining morale, esprit de corps and pride in [one's] fellow Marines"); Marine Corps Order 1650.19J Encl. 1, at 3; Army Reg. 600-8-22, ch. 1, § 1-1; SECNAV Instruction 1650.1H, at 3-1; AFPD para. 2. By recognizing acts of valor or achievements, military awards convey that the military services value and recognize the underlying conduct. See, *e.g.*, Army Reg. 600-8-22, ch. 8, § 8-6(h)(1)(a) (explaining that Combat Infantryman Badge "was intended as an inducement for individuals to join the infantry while serving as a morale booster for infantrymen serving in every theater").

The award of military honors is particularly important during wartime. For instance, as General George C. Marshall wrote in describing his advocacy during World War II for the creation of the Bronze Star, the medal would be used to "sustain morale and fighting

spirit in the face of continuous operations and severe losses." Charles P. McDowell, *Military and Naval Decorations of the United States* 171 (1984). Indeed, the importance of medals in fostering these values among service members has been recognized since the very first honors were created. General Washington, in establishing the first valor award, explained that it would "cherish a virtuous ambition in his soldiers, as well as * * * foster and encourage every species of military merit." *General Orders* 35. Similarly, when Congress created the Medal of Honor during the Civil War, the bill's sponsor explained that the provision "need[ed] no explanation," as creating the honor would ensure that "the men in Navy shall be encouraged to brave deeds," and would be more effective in that regard than promotions and other incentives.[8] Cong. Globe, 37th Cong., 2d Sess. 72 (1861); *Medal of Honor Report* 3.

2. The extent to which the military honors program serves these critical goals depends on the government's ability to safeguard the program's integrity. See *Awards Hearing* 22 (statement of Lt. Gen. Michael D. Rochelle, Deputy Chief of Staff, G-1, U.S. Army) ("In order for the awards program to be credible to soldiers as well as the American people, it must * * * ensure the integrity of the award, especially valorous awards."). To maintain their status as prestigious symbols of honor

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[8] The court of appeals wrongly dismissed this established function of military awards as "unintentionally insulting" to service personnel. Pet. App. 39a. It is common sense that those serving in the armed forces do not rise to the occasion purely in hopes of receiving a medal. But acknowledging that fact does not detract from the force of the armed services' longstanding view that military awards are a vital means of inspiring higher performance and maintaining the morale necessary for effective unit performance.

and the Nation's gratitude, military honors—particularly the highest valor awards—must be awarded only to a select group who are unquestionably deserving. See, *e.g.*, Marine Corps Order 1650.19J Encl. 1, at 3 (decorations should be awarded to "personnel whose performance of duty is exceptional and clearly recognized by superiors and contemporaries alike"). The honors also must be perceived as having been awarded through a rigorous process that guarantees accuracy with respect to the conduct at issue and the degree to which the actions merit recognition. See *Awards Hearing* 22.

To that end, Congress and the armed services have gone to great lengths to ensure that only the most deserving individuals receive medals. See pp. 4-6, *supra*; *Awards Hearing* 21, 81, 117. Valor awards, such as the Medal of Honor, are conferred only on those who have committed extraordinary acts of heroism.[9] In order to recognize a range of valorous actions while avoiding awarding the highest honors too frequently, Congress and the armed services have developed a detailed hierarchy of awards, each with its own criteria. Compare, *e.g.*, 10 U.S.C. 3741 (Medal of Honor criteria), with 10 U.S.C. 3742 (Distinguished-Service Cross). The conferral of a particular award therefore reflects a judgment, and communicates a message, about the degree of valor involved and its relation to military tradition. See *Awards Hearing* 22.

The armed services also maintain stringent procedures for evaluating award recommendations. Of particular importance is proof that the individual actually performed the valorous acts that justify the award. All

[9] Indeed, today there are only 85 living recipients of the Medal of Honor. See Congressional Medal of Honor Soc'y, *Archive Statistics*, http://www.cmohs.org/medal-statistics.php.

combat award recommendations must be supported by two eyewitness statements, *Awards Hearing* 118, and the Medal of Honor requires proof beyond a reasonable doubt. *Awards Manual* 31. In addition, all recommendations are subject to multiple reviews designed to satisfy the chain of command that the events in question actually occurred, that they are deserving of recognition, and that the appropriate level of recognition has been chosen. *E.g.*, *id.* at 12-24.

Congress and the armed services have also taken steps to ensure that individuals who receive valor awards have not engaged in conduct that could tarnish the award's meaning. Congress has provided that the highest military honors may not be awarded to someone whose subsequent conduct "has not been honorable." See, *e.g.*, 10 U.S.C. 3744(c) and 6249. The Department of Defense's awards policy provides that medals may be revoked if later-discovered facts would have prevented the award of the medal and that no Departmental or joint-service award may be conferred on someone whose "entire service during or after" the events in question has not been honorable. See *Awards Manual* 4; *Medal of Honor Report* 14 ("[I]t is precisely *because* of these legalistic safeguards that the Medal of Honor is a symbol of such glorious tradition today.").

3. The government thus has a compelling interest in protecting the integrity of the military honors system. One aspect of the government's interest is the need to protect the awards from misappropriation through false claims to have been awarded a medal. The diluting effect of such claims undermines the military awards system's ability to fulfill both of its important purposes, namely, conveying gratitude and recognition and fostering morale within the armed forces.

a. False claims to have been awarded a military medal misappropriate the prestige and honor associated with that medal. The cumulative effect of such claims is, as Congress found in enacting the Stolen Valor Act, to dilute and "damage the reputation and meaning of such decorations and medals." Stolen Valor Act, § 2(1), 120 Stat. 3266. In the aggregate, false representations threaten to make the public skeptical of any claim to have been awarded a medal. Such claims also undercut the government's screening to ensure that the award recipients, the conduct for which the honors are conferred, and the recipients' subsequent military record are deserving of the government's recognition. These cumulative effects diminish the awards' effectiveness in conferring prestige and honor on those who actually have been awarded medals.

False claims to have received military awards also undermine the awards' important function within the armed services. In the aggregate, false claims diminish the value and prestige of the medals for servicemembers by creating the impression that many more people have received military honors than is actually the case. This is particularly true of the most selective awards, such as the Medal of Honor, which have a small number of actual recipients and are the most likely to be the subject of false representations because of their extraordinary prestige. False claims also may sow confusion about the military's standards for awarding each type of medal and the consistency with which medals are awarded, undermining the morale-promoting effects that the awards are intended to have. Indeed, in order to preserve the awards' value and function within the services, the military prosecutes active-duty service members who falsely claim or wear awards that they have not re-

ceived under the Uniform Code of Military Justice. See 10 U.S.C. 934 (offense of "conduct of a nature to bring discredit upon the armed forces"); see also, *e.g.*, *United States* v. *Avila*, 47 M.J. 490 (1998) (defendant wore and used falsified documents to claim that he had won a Bronze Star). These efforts are undermined if false claims are rampant outside of the military.

In view of the harm caused by false claims to have received military honors, Congress has long taken measures to prevent such claims. Soon after the official establishment of the Medal of Honor, people began using imitation medals, creating "confusion as to who earned and who did not earn the Medal of Honor." *Medal of Honor Report* 4. Congress took various measures to prevent that dilution, including providing for the publication of the names of Medal of Honor recipients and obtaining a patent on the medal's design in order to prevent imitations. *Id.* at 6. Congress also established the Medal of Honor Society as a federally chartered corporation, whose purpose, among other things, is "to protect the name of the medal and individual holders of the medal from exploitation." 36 U.S.C. 40501, 40502. In 1923, Congress prohibited knowingly wearing, manufacturing, or selling a military medal without authorization. See Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286. That provision, now codified at 18 U.S.C. 704(a), was enacted on the recommendation of the War Department, which had expressed concern that unauthorized imitations would "cheapen[] the decorations in question" and noted that "[i]f the decorations of honor * * * awarded by the War Department are to continue to serve the high purpose for which they are intended, they are worthy of being protected." H.R. Rep. No. 1484, 67th Cong., 4th Sess. 1-2 (1923).

Section 704(b) is thus the latest in a long line of congressional efforts to protect military honors from misappropriation and dilution. Congress enacted Section 704(b) in 2006 because it concluded that the existing prohibition on the unauthorized wearing of medals was insufficient to protect against false claims to have been awarded a medal.[10] § 2(3), 120 Stat. 3266 ("[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals"). The statute thus supplements the existing protections against misappropriation and dilution.

b. Respondent contends (Br. in Opp. 25) that Section 704(b) serves no proper government interest because it is an attempt to prohibit "libel on government." Relying

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[10] In the years preceding the Act's passage, the press documented an apparent "surge" in false claims to have been awarded a medal. See Pam Belluck, *On a Sworn Mission Seeking Pretenders To Military Heroism*, New York Times, Aug. 10, 2001, available at 2001 WLNR 3382421. In 2001, for instance, 219 Virginia residents claimed to have won the Medal of Honor on their tax returns, but only four people in the State had actually received the medal. See *Making a Sham of Military Honors*, Virginian-Pilot and Ledger-Star, Aug. 9, 2004, available at 2004 WLNR 3452826 (false claim to have been awarded the Silver Star, Legion of Merit, Defense Meritorious Service Medal, and Purple Heart). See generally, *e.g.*, Jeff Long, *Illinois Targets Military Plate Liars*, Chicago Tribune, Dec. 27, 2005, available at 2005 WLNR 23506611 (false claim to have received Purple Heart); *Probation for Phony Medals Claims*, Bucks County Courier Times, Sept. 19, 2004, available at 2004 WLNR 17336228 (claim to have won several medals, including the Navy Cross); Tom Farmer, *Dishonorable Decoration; Marine's Unearned Medal Exposed*, Boston Herald, Feb. 10, 2004, available at 2004 WLNR 401638 (chairman of Marine Honors Society claimed to have received Navy Cross); *Man Held in Cole County on Old Warrant Charged for Wearing Fake Medal of Honor*, July 12, 2002, Jefferson City News-Tribune, available at 2002 WLNR 15346628.

on the Court's decisions invalidating statutes prohibiting flag burning, see *Texas* v. *Johnson*, 491 U.S. 397 (1989); *United States* v. *Eichman*, 496 U.S. 310 (1990), respondent contends that Section 704(b)'s stated purpose of protecting the "reputation" of medals, § 2(3), 120 Stat. 3266, amounts to a prohibition on criticism of the government. Respondent is incorrect. In *Johnson*, the State justified its prohibition on flag burning based on an interest in protecting the flag as a "symbol of * * * national unity," arguing that "if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited." 491 U.S. at 413. The statute thus prohibited a form of criticism of the government, and the Court held that the government may not "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417. Accord *Eichman*, 496 U.S. at 317-318.

Here, by contrast, Section 704(b) is not directed at criticism of—or any particular message about—a government symbol. Section 704(b) does not prevent anyone from criticizing medal recipients, the military awards system, military policy, or any official action. Nor does it prohibit desecration or destruction of medals in order to express a point of view, or false claims of military heroism. Rather, Section 704(b) prohibits only knowingly false claims to have been awarded a medal—in other words, claims that misappropriate the official honor and approbation that the medals signify, thereby diminishing their ability to serve their important purposes. Preventing misappropriation and dilution of military honors by means of knowing misrepresentations is

a strong—and compelling—government interest that is entirely consistent with the First Amendment and entirely unrelated to the suppression of dissent. This Court has previously recognized as much. See *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 535-536 (1987) (*San Francisco Arts*) (prohibition on unauthorized use of the term "Olympics" was unrelated to governmental desire to suppress any particular message and did not prevent people from expressing any point of view); *Johnson*, 491 U.S. at 415 n.10 (distinguishing *San Francisco Arts* on the ground that the misappropriation prohibition in that case did not implicate concerns about suppressing criticism of the government).

B. Section 704(b) Provides Adequate Breathing Space To Fully Protected Speech

Section 704(b) properly accommodates the compelling government interest in protecting the integrity of the military honors system and First Amendment concerns because it provides ample "breathing space" for fully protected speech. *New York Times*, 376 U.S. at 272 (citation omitted). Section 704(b) does not inhibit expression of opinion about military policy, the meaning of military awards, the values they represent, or any other topic of public concern. Nor does the provision have the effect of chilling such speech—or any debate, discussion, or other protected statements on any topic. It therefore provides adequate breathing space to protected speech. And even if Section 704(b) did chill some speech, the provision is constitutional because its prohibition on all knowingly false claims to have won a military award "reach[es] no farther than is necessary." *Gertz*, 418 U.S. at 349.

1. Section 704(b) does not chill any protected speech

A number of Section 704(b)'s attributes ensure that its narrow prohibition will not have the effect of deterring any speech except the knowing misrepresentations that the statute prohibits. Because Section 704(b) does not pose any danger of chilling any protected speech, the provision is constitutional. See *Telemarketing Assocs.*, 538 U.S. at 620-621.

Crucially, Section 704(b) prohibits only knowing misrepresentations, see pp. 15-17, *supra*, on a particular personal subject matter. This scienter requirement provides "an extremely powerful antidote to the inducement to * * * self-censorship." *Gertz*, 418 U.S. at 342; *Telemarketing Assocs.*, 538 U.S. at 620. The Court has never invalidated a false-statement restriction that contained a knowledge requirement. See pp. 22-28, *supra*.

The statute's prohibition of only a discrete category of misrepresentations of fact about the speaker himself reinforces the scienter requirement, making it virtually certain that no one would refrain from engaging in truthful speech about medals in order to avoid the possibility of prosecution. A person is unlikely to be mistaken about whether he has received a military medal, and the accuracy of any such claim is objectively verifiable. As a result, there will rarely be uncertainty about the falsity of the representation or a dispute about the speaker's knowledge, and thus there is little likelihood that people will refrain from truthful speech about military awards out of "doubt whether [truth or lack of knowledge] can be proved in court or fear of the expense of having to do so." *New York Times*, 376 U.S. at 279; cf. *Virginia State Bd.*, 425 U.S. at 772 n.24 (the verifiable nature of commercial assertions means that less breathing room is necessary to "insure that the flow of truthful

and legitimate commercial information is unimpaired"). The government, moreover, must establish any disputed facts beyond a reasonable doubt. See *Telemarketing Assocs.*, 538 U.S. at 620 ("Exacting proof requirements" in fraud actions, where government must prove fraud by clear and convincing evidence, provide "sufficient breathing room for protected speech.").

A speaker need not fear that the statute, though facially viewpoint-neutral, might be used to punish disfavored speech. Cf. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (government may regulate a class of unprotected speech when "no significant danger of idea or viewpoint discrimination exists"). Because the line between a knowingly false award-related claim and all other statements—about military service, valorous acts, military policy, or the like—is well-defined and objective, the government could not use Section 704(b) to impose its own view of "truth" or punish criticism. Cf. *New York Times*, 376 U.S. at 272; *Meyer* v. *Grant*, 486 U.S. 414, 419 (1988). As a result, this case does not implicate Justice Jackson's admonition that "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). Although, as Justice Jackson observed, "it is not the right * * * of the state to protect the public against false *doctrine*," *ibid.* (emphasis added), Section 704(b) does not purport to do any such thing. But cf. Br. in Opp. 22. It prohibits only a discrete and narrow category of false factual statements, and the line between such misrepresentations and any "doctrine," viewpoint, or other assertion is objectively clear.

2. *Even assuming that Section 704(b) risked chilling some protected speech, the prohibition extends no further than necessary*

Because Section 704(b) furthers a strong government interest and does not deter any protected speech, the provision should be upheld. Even assuming that Section 704(b) did chill some speech, however, the provision is constitutional because its prohibition on all knowingly false claims to have won a military award "reach[es] no farther than is necessary." *Gertz*, 418 U.S. at 349.

First, the provision targets only those representations that reasonably can be understood as factual claims to have won a medal—the type of misappropriation that dilutes the meaning and value of the medals.

Second, even if an isolated misrepresentation by itself would not tarnish the meaning of military honors, the cumulative force of all such misrepresentations would. See pp. 41-43, *supra*; Pet. App. 74a (Bybee, J., dissenting). Because that aggregate effect is the harm that Congress sought to remedy, Section 704(b) does not require a showing of particularized injury from individual misrepresentations. Contrary to the court of appeals' view, *id.* at 30a-35a, a restriction on false factual statements need not include an element of particularized injury if it otherwise provides adequate breathing space to protected speech. In *Gertz*, for instance, the Court held that juries may presume injury in defamation cases, so long as the plaintiff is required to prove actual malice. 418 U.S. at 349-350. That holding presupposes that the First Amendment permits a State to conclude that certain false statements are categorically harmful even if particularized injury is not proven in individual cases, so long as other aspects of the restriction ensure adequate breathing space. In addition, Congress has

long prohibited categories of false factual statements that it has determined cause presumptive harm to government programs, see, *e.g.*, 18 U.S.C. 1001, pp. 29-33, *supra*, and these statutes have never been thought to be inconsistent with the First Amendment.

Third, relying on the public to discover and refute false claims would not effectively address the aggregate harmful effects of false claims. But cf. Pet. App. 37a-38a. Although some misrepresentations may be promptly investigated and exposed, many others are not discovered for substantial amounts of time, if ever. See, *e.g.*, *United States* v. *Hinkson*, 585 F.3d 1247, 1254-1256 (9th Cir. 2009) (en banc) (witness used fraudulent military records to fool prosecutors, judge, and defense attorneys with false claim of having won Purple Heart, and district court initially could not determine based on military records whether the claims were true or false). There is no publicly accessible database of medal recipients nor, often, any reason to think that an individual's claim to have received a medal would be subject to skeptical scrutiny by the public. Moreover, public refutation is necessarily an inadequate solution because some military records have been lost, rendering some claims unverifiable. See Office of the Under Sec'y of Defense, *Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database* 5-8 (2009) (*Decorations Database*). Even if those particular false claims cannot be prosecuted as a result of lost records, Section 704(b) deters them in the first place. And because the medals' meaning is eroded by the aggregate effect of these false claims, including claims that are less susceptible to counterspeech, preventing that cumulative harm requires prosecuting the

claims that are provably false in order to deter all knowingly false claims.

C. Section 704(b) Does Not Unconstitutionally Restrict Legitimate Self-Expression

Despite Section 704(b)'s provision of ample breathing space to fully protected speech, respondent contends (Br. in Opp. 23-25) that Section 704(b) is unconstitutional because "the right to speak about oneself—even to lie—is * * * intimately bound up with a particularly important First Amendment purpose: human self-expression." Br. in Opp. 23 (quoting Pet. App. 108a). Protecting the right to self-expression is unquestionably an important value underlying the First Amendment. The Court has not suggested, however, that statements about oneself are entitled to a higher degree of protection than other forms of speech, or that statements that may otherwise be restricted—such as knowingly false statements that constitute intentional infliction of emotional distress, or fraudulent statements—are less susceptible to restriction simply because they happen to pertain to the speaker himself. Cf. *Firestone*, 424 U.S. at 456 (stating that the Court has avoided using "subject-matter classifications" to draw constitutional lines in the defamation context, because doing so may "too often result in an improper balance between the competing interests in this area").

In any event, respondent is incorrect that Section 704(b) prohibits all but "the monotonous reporting of strictly accurate facts about oneself." Br. in Opp. 24 (quoting Pet. App. 108a-109a (Kozinski, J., concurring)). Section 704(b) prohibits only those misrepresentations that are reasonably understood as assertions of fact, thereby preserving hyperbole, satire, and other expres-

sive statements, and it sweeps no further than necessary to prevent the significant harm arising from deceptive claims. Upholding Section 704(b) on the basis of the government's compelling interest in the integrity of the military honors system and Section 704(b)'s provision of ample breathing space to fully protected speech would not suggest that the government may prohibit all forms of "embellish[ment]" or "tell[ing] tall tales." *Id.* at 24.

The discrete category of false misrepresentations prohibited by Section 704(b) bears little resemblance to the false statements pertaining to one's private life that respondent suggests would be sanctionable if Section 704(b) were upheld. See Br. in Opp. 8 (quoting Pet. App. 107a ("I'm working late"; "I got stuck in traffic") (Kozinski, C.J., concurring)). Upholding Section 704(b) on the basis of the government's compelling interest and the absence of chill of protected speech would not suggest that other restrictions on false statements, which would be evaluated in light of the government interest and the degree of chilling effect involved, would necessarily be constitutional.

D. Section 704(b) Is Not Unconstitutional As Applied To Petitioner

Finally, respondent contends (Br. in Opp. 26-28) that this Court could affirm the judgment below on the alternative ground that Section 704(b) is unconstitutional as applied to him. Because respondent made his false claims while introducing himself as an elected officer at a water district meeting, he argues that he was punished for political speech. To the contrary, respondent's knowingly false representation was not a "[d]iscussion[] of qualifications of political candidates," "governmental affairs," or "public issues," Br. in Opp. 27, nor did it as-

sist in expressing any opinion on these issues. Cf. *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 346-347 (1995).

Under Section 704(b), respondent was free to express his views on public office or his qualifications for office in any way he wished. He was not free, however, knowingly to misrepresent that he had been awarded the Nation's highest military honor. See *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2723-2724 (2010) (holding that material-support statute did not restrict pure political speech because it left people free to express any view on any topic). Respondent's making of his false claims during a political event does not immunize him from prosecution under an otherwise constitutional statute that prohibits a narrow category of knowing misrepresentations without regard to the context in which they are made—any more than the political context would immunize defamation or fraud. One is no more likely to be unsure about having been awarded a medal, or uncertain about whether the truth of one's claim could be proven in court when one is speaking in a political context, compared to other contexts.

The statutes invalidated in the decisions on which respondent relies illustrate how narrowly cabined Section 704(b) is by comparison. In *Rickert* v. *State Public Disclosure Commission*, 168 P.3d 826 (Wash. 2007), and *State ex rel. Public Disclosure Commission* v. *119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998), the Washington Supreme Court invalidated state statutes that prohibited making material false statements in political advertising or about another candidate for office, explaining that the State has no "independent right to determine truth and falsity in political debate." *Rickert*, 158 P.3d at 829 (quoting *119 Vote No! Comm.*, 957 P.2d

at 695); see also *281 Care Comm.* v. *Arneson*, 638 F.3d 621, 633-634 (8th Cir. 2011) (invalidating state ban on knowingly false statements about ballot initiatives for the same reason), petition for cert. pending, No. 11-535 (filed Oct. 25, 2011). That rationale has no application here, because Section 704(b) does not present any danger that the government will act as an arbiter of truth and falsity in public debate.

IV. SECTION 704(b) ALSO CAN BE UPHELD UNDER STRICT SCRUTINY

Even if the court of appeals was correct in subjecting Section 704(b) to strict scrutiny, the statute survives that test. "[T]he statute is carefully drawn to cover only a narrow category of speech," and the prohibition is necessary in order to safeguard the government's compelling interest. *Humanitarian Law Project*, 130 S. Ct. at 2723; see *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992); see also *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2738.

As the court of appeals acknowledged, the government has a compelling interest in protecting the integrity of its military award system against knowingly false claims that dilute the meaning of the awards. See Pet. App. 37a; pp. 37-46, *supra*.

Section 704(b) is necessary to protect the government's compelling interest. *Burson*, 504 U.S. at 198. Although the court of appeals suggested that it is speculative to conclude that the meaning of military awards is harmed by those who lie about having received one, Pet. App. 38a, it is common sense that false representations have the tendency to dilute the value and meaning of military awards. That is why Congress historically has acted to protect military awards from misappropriation.

In enacting Section 704(b), Congress found that these existing measures—including the prohibition on unauthorized wearing of medals, see 18 U.S.C. 704(a)—had proved inadequate to deter and punish false claims that did not involve also wearing a medal. See 120 Stat. 3266. Congress's "persistent battle" against misrepresentations about military honors and its historical experimentation with different methods of combating the problem demonstrates that Section 704(b) is "necessary in order to serve" the government's compelling interest in protecting the integrity of the military honors system. *Burson*, 504 U.S. at 206.

For the reasons stated above, moreover, no less restrictive alternative would adequately serve the government's interest. While members of the public will discover and expose some false claims, many will remain unchallenged. See pp. 50-51, *supra*. Although Congress in 2008 investigated the feasibility of establishing a searchable medals database that would enable the public to verify claims, the Department of Defense concluded that such a database would be impracticable and insufficiently comprehensive. See *Decorations Database* 8-9; H.R. Rep. No. 652, 110th Cong., 2d Sess. 361 (2008). That reinforces Congress's conclusion that Section 704(b)'s prohibition is necessary to prevent the cumulative effect of false claims, including those that are less susceptible to counterspeech, from eroding the meaning of military honors. Section 704(b) permits carefully chosen prosecutions—where the government can prove that the defendant's claim was false and that he was aware of its falsity—to deter all knowingly false claims to have received military honors. No other remedy would adequately vindicate the compelling government interest at stake.

APPENDIX

18 U.S.C. 704 provides:

Military medals or decorations

(a) IN GENERAL.—Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barters, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

(c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.—

(1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punish-

ment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

(2) CONGRESSIONAL MEDAL OF HONOR DEFINED.—In this subsection, the term "Congressional Medal of Honor" means—

(A) a medal of honor awarded under section 3741, 6241, or 8741 of title 10 or section 491 of title 14;

(B) a duplicate medal of honor issued under section 3754, 6256, or 8754 of title 10 or section 504 of title 14; or

(C) a replacement of a medal of honor provided under section 3747, 6253, or 8747 of title 10 or section 501 of title 14.

(d) ENHANCED PENALTY FOR OFFENSES INVOLVING CERTAIN OTHER MEDALS.—If a decoration or medal involved in an offense described in subsection (a) or (b) is a distinguished-service cross awarded under section 3742 of title 10, a Navy cross awarded under section 6242 of title 10, an Air Force cross awarded under section 8742 of section 10, a silver star awarded under section 3746, 6244, or 8746 of title 10, a Purple Heart awarded under section 1129 of title 10, or any replacement or duplicate medal for such medal as authorized by law, in lieu of the punishment provided in the applicable subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 11-210

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In The
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UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the Stolen Valor Act of 2005, 18 U.S.C. § 704(b), which makes it a crime when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States," is facially invalid under the Free Speech Clause of the First Amendment.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 11-210

UNITED STATES OF AMERICA,
Petitioner,

v.

XAVIER ALVAREZ

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT

Xavier Alvarez lied. He lied when he claimed to have played professional hockey for the Detroit Red Wings. He lied when he claimed to be married to a Mexican starlet whose appearance in public caused paparazzi to swoon. He lied when he claimed to be an engineer. He lied when he claimed to have rescued the American ambassador during the Iranian hostage crisis, and when he said that he was shot going back to grab the American flag. A colleague was being charitable when he said, "I think after anyone meets Mr. Alvarez for the first time, one questions the

veracity of his statements." Pet. App. 4a-5a; Ninth Cir. Excerpts R. 18, 21; Will Bigham, *Records Claim More Alvarez Misdeeds*, Inland Valley Daily Bull., Oct. 25, 2007, http://www.dailybulletin.com/ci_7284004.

But none of those lies were crimes.

On July 23, 2007, Alvarez, an elected member of the Three Valleys Municipal Water District Board in Pomona, California, stood up at a meeting of a neighboring water board and introduced himself:

> I'm a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around.

Pet. App. 4a. In fact, Alvarez had never served in the military. *Id.* Alvarez's statement garnered him no tangible benefits, and there is no evidence that anyone relied on his false statement or even that anyone believed it. Pet. App. 4a, 29a, 94a. Nevertheless, as a result of that non-defamatory lie about himself, Alvarez was one of the first people prosecuted under the Stolen Valor Act of 2005, in which Congress made it a crime to "falsely represent . . . verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." 18 U.S.C. § 704(b). A heightened penalty attaches where the false claim involves the Medal of Honor or certain other medals. *Id.* § 704(c)-(d). The findings that accompanied the law state that "[f]raudulent claims surrounding the receipt of

[military decorations] damage the reputation and meaning of such decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266.

The public reaction was faster than the prosecution: Alvarez was immediately perceived as a phony, even before the FBI began investigating him. Pet. App. 26a. And just as quickly, he was pilloried in the community and in the press, labeled an "idiot," "jerk," and worse. Pet. App. 26a; Bigham, *supra* ("an embarrassment"); *Xavier Alvarez – Phony Soldier*, The Violence Worker! (Jan. 17, 2008), http://www.violenceworker.com/my_weblog/2008/01/xavieralvarez.html ("cretinous," "idiotic," "ultimate slime").

As this public shaming was playing out in the press, the district court denied Alvarez's motion to dismiss the indictment, in which he raised both facial and as-applied challenges to the constitutionality of the Act. Pet. App. 139a-44a. On appeal, the Ninth Circuit reversed. While false statements of fact may not be protected for their own benefit, "the right to speak and write whatever one chooses . . . without cowering in fear of a powerful government is . . . an essential component of the protection afforded by the First Amendment." *Id.* at 14a. As such, content-based restrictions on speech are subject to strict scrutiny except for "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Id.* at 7a (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Those

"historic and traditional categories long familiar to the bar include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Id.* (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (internal quotation marks and alterations omitted)).

False factual speech, however, is not one of the historically unprotected categories, nor could the statements at issue be squeezed into any of those categories. The court of appeals recognized that this Court had sometimes made broad pronouncements declaring false statements to be unworthy of protection in their own right, but only in contexts where the statement was made knowingly and caused some harm. Pet. App. 13a-19a. The Act did not constitute "defamation" for just this reason: it did not require scienter (which the court believed could be read into the statute under this Court's precedents) or harm (which could not). *Id.* at 22a-23a. While defamation safeguards the strong interest in protecting individuals from injury to their reputation, it is far from clear that the government can use defamation law to restrict speech "as a means of self-preservation," or, in other words, where the only value threatened is the reputation of a government institution or symbol. *Id.* at 24a. For similar reasons, the Stolen Valor Act is not sufficiently akin to perjury or fraud statutes to warrant exemption under those categories. *Id.* at 27a-28a.

Because false statements of fact are not historically unprotected, the court of appeals applied strict

scrutiny. Pet. App. 35a. Even the dissent conceded the Act did not satisfy that standard. *Id.* at 36a, 70a. While the end was "noble," a criminal sanction is not a narrowly tailored means; there is no evidence false claims actually affect the integrity of the medals, and to the extent they do, the government should encourage counterspeech or legislate against actual fraud. *Id.* at 37a-39a.

Judge Bybee dissented. His view, based on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974), was that false statements of fact are valueless in the constitutional calculus and should be protected only to the extent necessary to protect speech "that matters." Pet. App. 42a. Using that construct, he concluded that the Stolen Valor Act was constitutional because it would not suppress such speech. *Id.* at 69a, 76a, 90a.

Rehearing en banc was sought, but denied. Pet. App. 91a-92a. Judge M. Smith authored a concurrence from denial of rehearing in which he reiterated that the Supreme Court had upheld limitations on false statement of fact only where such limitations required a culpable state of mind and caused injury. *Id.* at 99a. He also pointed out that the dissent did not cogently define "speech that matters," and that its proposed test invites courts to engage in the very "ad hoc," "free-wheeling," "case-by-case" approach that *Stevens* found so "startling and dangerous." *Id.* at 106a (quoting *Stevens*, 130 S. Ct. at 1585-86).

A dissent by Judge O'Scannlain was along the same lines as Judge Bybee's analysis. Pet. App. 116a-35a. A second dissent, authored by Judge Gould, would permit Congress more leeway to legislate in the context of the military. *Id.* at 135a-138a.

Chief Judge Kozinski separately concurred:

> So what, exactly, does the dissenters' ever-truthful utopia look like? In a word: terrifying. If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review."

Pet. App. 107a. This, Judge Kozinski reasoned, ran contrary to First Amendment principles: "[O]ne fundamental concern of the First Amendment is to 'protec[t] the individual's interest in self-expression,'" and "[s]elf expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all." *Id.* at 108a-109a (citation omitted). In other words: "Saints

may always tell the truth, but for mortals living means lying." *Id.* at 109a.

SUMMARY OF ARGUMENT

The Stolen Valor Act criminalizes the simple act of lying about oneself. To uphold the law, the government asks this Court to read elements and caveats into its text and to ignore the contexts in which false statement laws have been upheld. It would create a new *sui generis* test that would have broad implications and would require the Court to evaluate the government's interest and First Amendment credentials of the false statements on an ad hoc, case-by-case basis. But no special test is required for false statements. Under well-settled precedent, the Act is a content-based restriction on speech, is subject to strict scrutiny, and cannot meet that standard. It is therefore unconstitutional.

I. The First Amendment excepts from its coverage only limited, historically unprotected categories of speech. The government admits that the category of speech at issue here – false statements of fact – does not lay claim to the historical pedigree required under *Stevens*, 130 S. Ct. at 1584-86, for categories to be considered "unprotected." This admission should be deemed fatal. The general rule is that content-based restrictions on speech are subject to strict scrutiny, and the Stolen Valor Act cannot meet that standard. The government's interest in protecting the

reputation of military medals is legitimate, but not compelling. As its own *amici* concede, false claimants cannot tarnish the reputation of medal winners. And, in light of the many steps the military takes to honor award winners, it is not credible that false claims are actually a serious impediment to the military's attempts to foster morale. Moreover, even if the interest were compelling, criminalization – the most extreme option – is not necessary; government speech and education, prosecutions targeting fraud, and, most importantly, public refutation of claims – more speech – are all less-restrictive alternatives.

The government is wrong, moreover, about the scope of the statute. While this Court could, consistent with its precedents, read a scienter element into the statute, it strains the text too far to read "falsely represents" to include only "serious" representations and to exclude satire, hyperbole and the like.

II. In contrast to the straightforward strict scrutiny analysis, the government seeks to create a new test – completely unmoored from this Court's precedents – that would permit prosecution of lies so long as the government was able to conjure an "important" interest, and so long as the law leaves breathing space for fully protected speech. This test is insufficiently protective for several reasons. It requires an evaluation of harm and value that harks back to the test this Court found "startling and dangerous" two Terms ago. It presumes that false factual speech is entirely valueless and should only

be protected to the extent necessary to protect valuable "true" speech. But, in fact, falsehoods are valuable for innumerable reasons: in refining truth, in expressing personal autonomy, and in greasing the wheels of social interaction. More than that, there is a realm of harmless prattle and puffery generally considered beyond government control. This, in and of itself, is a reason not to put false statements beyond the purview of First Amendment protection.

The government asserts that this Court has routinely subjected false statements to a breathing space test and that its proposed test explains this Court's diverse jurisprudence. But in fact, the Court has not imposed a "breathing space" test on false statements broadly, but rather only on a subset of false factual statements that are unprotected: those that, under *Chaplinsky*, have never been thought to fall within the circle of First Amendment protection. Breathing space is a minimal protection, appropriate to areas that have historically been viewed as outside the First Amendment, but is insufficiently protective of speech that is not unprotected.

Finally, even if this Court were to adopt the government's rule, the Stolen Valor Act should still be deemed unconstitutional. The government's attempt to prevent the offense caused by false claimants is laudable but does not warrant the intrusion on speech it causes, and thus "goes farther than necessary."

III. The Act is also unconstitutional as applied to Alvarez, a political officeholder, who was describing his background and qualifications for office when he made the statement at issue. A politician discussing his qualifications is core political speech. Were the Court to conclude the Act was not facially unconstitutional, it is still unconstitutional as applied to Alvarez.

ARGUMENT

Everyone lies. We lie all the time. Sometimes we lie to feel better about ourselves, sometimes to make others feel better about themselves, sometimes to help, sometimes to hurt. For good or bad, right or wrong, everyone lies. Pet. App. 109a-110a. Xavier Alvarez is no exception. He has told a bunch of whoppers, *see supra* p.1, his claimed receipt of the Medal of Honor being just one of many. But exaggerated anecdotes, barroom braggadocio, and cocktail party puffery have always been thought to be beyond the realm of government reach and to pass without fear of criminal punishment. After all, the First Amendment commands, in unequivocal terms, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

Congress, however, through passage of the Stolen Valor Act, 18 U.S.C. § 704(b), has ordained that making a false claim about receiving military honors should be criminally sanctioned. The Act prohibits

the "*mere utterance or writing*," Pet. App. 2a, of a non-defamatory falsehood about oneself. Indeed, there was no dispute among the judges below, whether in majority or dissent, that "the Act 'seek[s] to regulate "only . . . words,"' that the Act targets words about a specific subject (military honors), and that the Act is plainly a content-based regulation of speech." *Id.* at 93a-94a (citations omitted).

Because the Act is a content-based restriction on speech that serves neither a compelling government interest nor is the least restrictive means necessary to satisfy any government interest, it cannot survive strict scrutiny. In an attempt to avoid this straightfoward analysis, the government has invented a new, unworkable "breathing space" balancing test, which entirely undervalues false statements of fact, is inconsistent with this Court's precedents, and should be rejected by this Court. But even were the Court to adopt the government's harm/value test, the government's failure to demonstrate the need for the law, the fact that the government's interest is sufficiently protected by other means, and the fact that the government is attempting to impose a certain viewpoint about the "importance" of medals, all show that the government cannot satisfy even its own test of constitutionality. Accordingly, the judgment of the Ninth Circuit should be affirmed.

I. THE STOLEN VALOR ACT IS A CONTENT-BASED RESTRICTION ON SPEECH AND IS FACIALLY UNCONSTITUTIONAL.

Although the words appear nowhere in the government's argument, the starting place for the analysis must be the First Amendment's unambiguous text: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Framers, rightly concerned that an all-powerful government might try to limit an individual's right to speak what he thinks, enshrined in our Constitution a prohibition on enacting laws that interfere with our right to speak and write what we choose. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [those who won our Independence] amended the Constitution so that free speech and assembly should be guaranteed."). Indeed, in each of the past two Terms, this Court reiterated that "[t]he most basic of [the principles of freedom of speech and the press] is this: '[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Brown v. Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)) (alterations in original); *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (same).

The Court has, however, recognized limited exceptions to this general rule: "'From 1791 to the present' . . . the First Amendment has 'permitted

restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' These 'historic and traditional categories long familiar to the bar,'" include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Stevens*, 130 S. Ct. at 1584 (citations omitted). "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2734 (quoting *Stevens*, 130 S. Ct. at 1585). That is, apart from those narrow grounds, when "a law is directed to speech alone [and] where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm . . . [n]o further inquiry [should be] necessary to reject the [government]'s argument that the statute should be upheld." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring).

Falsely claiming receipt of military honors, though surely offensive to many, is not obscene, nor is it defamatory or libelous; there is no clear or present danger in the utterance of the falsehoods – no incitement to riot or an intent to bring about imminent

harm is required. The law does not require fraud, *i.e.*, that the statement was made to obtain some benefit, caused reliance, or was material. It simply criminalizes the false claim to certain military decorations in every context. Such restriction on speech is not amongst those "well-defined and narrowly limited classes of speech . . . [that have] never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), and the government does not claim otherwise. Br. for United States ["Gov't Br."] 19.[1] As such, the Court should start from the premise that the statements at issue here are not unprotected speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271-80 (1964) ("Authoritative interpretations of the First Amendment

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[1] The government suggests that prohibiting lies about military honors dates back to George Washington's Revolutionary War order that "any who . . . assume the badges of [honorees] . . . be severely punished." Gov't Br. 3 (quoting *General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783*, at 34-35 (Edward C. Boynton ed., 1883; reprint 1909)). But *General* Washington's order, issued years before the Constitution or the Bill of Rights existed, plainly applied to those over whom the General had authority – members of the military. Then, as now, a false claim made by a servicemember might be punishable while a similar claim by a civilian might not. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker v. Levy*, 417 U.S. 733, 758 (1974).

guarantees have consistently refused to recognize an exception for any test of truth. . . . ; '[t]he constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'") (citation omitted); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (speakers may often use "exaggeration," "vilification," "and even . . . false statement[,] [b]ut the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy").

A. The Government Has Not, And Cannot, Demonstrate That The Stolen Valor Act Passes Strict Scrutiny, The Standard Applicable To This Content-Based Restriction On Speech.

"Content-based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption." *United States v. Playboy Entertainment Group*, 529 U.S. 803, 817 (2000) (quotation marks and citation omitted). This Court has consistently held that content-based statutes are facially invalid unless the government can meet the rigors of strict scrutiny. *See, e.g.*, *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2738 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)); *Playboy Entertainment Group*, 529 U.S. at 813, 817; *Simon & Schuster*, 502 U.S. at 123. To meet the rigors of strict scrutiny, the government

"must specifically identify an 'actual problem' in need of solving," *Entertainment Merchs. Ass'n*, 131 S. Ct. at 2738 (quoting *Playboy Entertainment Group*, 529 U.S. at 822-23), "and the curtailment of free speech must be actually necessary to the solution," *id.* (citing *R.A.V.*, 505 U.S. at 395). Given this "demanding standard . . . '[i]t is rare that a regulation restricting speech because of its content will ever be permissible.'" *Id.* (quoting *Playboy Entertainment Group*, 529 U.S. at 818).[2]

Significantly, there is no real dispute that the Stolen Valor Act constitutes a content-based restriction on speech, nor could there be. The law restricts speech, not on the basis of *where* or *how*, but on *what* is said. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And both the majority and the dissent below agreed that if the law were subject to strict scrutiny, it could not meet that standard. Pet. App. 70a, 94a. This Court should follow suit.

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[2] "The vice of content-based legislation – what renders it deserving of the high standard of strict scrutiny – is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Hill v. Colorado*, 530 U.S. 703, 743-44 (2000) (Scalia, J., dissenting) (internal quotation marks omitted).

1. The government has failed to demonstrate a compelling government interest in enacting the Stolen Valor Act.

To satisfy strict scrutiny, the government must demonstrate that the law is narrowly tailored to achieving a compelling government interest. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010). Preserving the reputation of military decorations is certainly a legitimate government interest, but it is not a "compelling" one for purposes of strict scrutiny.[3] A compelling government interest is an interest "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). "Accordingly, the universe of interests sufficiently compelling to justify content-based restrictions on pure speech is extraordinarily limited." *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010) (citing *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (recognizing a compelling interest in "protecting the physical and psychological well-being of minors"); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("no governmental interest is more compelling than the security of the Nation")). In *Strandlof* – the first case to declare the Stolen Valor Act unconstitutional –

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[3] The court of appeals acknowledged that the government might have a compelling interest in protecting the integrity of the military award system, Pet. App. 37a, but did so hurriedly on its way to the heart of its analysis, which was that the Act was not narrowly tailored to achieve a government interest.

the court rejected the government's claim that the Act served "a compelling interest of protecting the sacrifice, history, reputation, honor, and meaning associated with military medals and decorations." *Id.* Relying on *Texas v. Johnson*, 491 U.S. 397, 417 (1989), in which this Court vacated a conviction under a law banning flag desecration as an unconstitutional content-based restriction on speech, the court concluded that preserving the symbolic meaning of military awards is not sufficiently compelling to survive strict scrutiny. *Strandlof*, 746 F. Supp. 2d at 1190. It similarly rejected the government's dilution argument as insufficiently compelling, concluding: "Servicemen and women may be motivated to enlist and fight by the ideals the medals represent, but I give no credence to the notion, and, more to the point, the government has offered no evidence in support of its burden to prove, that the medals themselves provide potential recipients any incentive to act to protect their comrades-at-arms or the interests of this nation they have sworn to defend." *Id.* at 1191.

Here, the government does not appear to support protecting military medals for their own sake, but because it believes false award claims dilute the prestige and gratitude afforded actual medal winners, and hamper its ability to foster military morale. Gov't Br. 37-44. These were not rationales supplied by Congress. Indeed, there was little discussion of the magnitude of the problem or the efficacy of the proposed solution in any testimony, hearings, or floor debate – a mere five pages of House debate supplies

nothing more than patriotic bombast with a few false claims anecdotes sprinkled in. *See* 152 Cong. Rec. H8819-8823 (daily ed. Dec. 6, 2006). This, in and of itself, is problematic to the government's argument.

Moreover, for these newly proffered rationales to gain purchase, the government must actually prove its assertion that false claims have an impact on military morale. The government has not done so, as even its own *amici* concede. As to the reputations of honorees, *amici* Veterans of Foreign Wars et al. are correct that "there is nothing that charlatans such as Xavier Alvarez can do to stain their honor." Br. for Veterans of Foreign Wars et al., as *amici curiae* for petitioner ["VFW Br."], at 1. Indeed, there can be no doubt that individuals like Alvarez claim to have military decorations precisely because of the prestige and gratitude afforded medal winners. And the public outcry at false claims is likewise strong evidence that the reputation of these military honors is not endangered in the least. *See Johnson*, 491 U.S. at 419 (noting that the public's strong reaction to flag burning evidenced that the value of the flag as a symbol of national unity was not in serious danger).

As to fostering morale, "there is no evidence – nor any reasonable basis for assuming – that some people's false claims to have received the medal has a demotivating impact on our men and women in uniform." Pet. App. 39a. False claims do not prevent the military from honoring those within its ranks or from publicizing its honorees. They do not keep the military from telling even generals to salute those

who have received the Medal of Honor, from using awards to determine promotions within their own ranks, or from bestowing other benefits on medal winners and their families – all of which the military currently does, in ways ensuring those benefits flow to true honorees. *See* 10 U.S.C. § 3991 (providing for 10% retirement pay increase for those recognized for "extraordinary heroism in the line of duty"); Marine Corps Order P.1610.7F, at 4-8 (2006) ("fitness reports" – that is, periodic evaluation of a Marine for purposes of "retention and promotion" – require documentation of any awards); 38 C.F.R. § 3.802(a), 32 C.F.R. §§ 553.15(d), 575.3(b)(3) (describing other benefits to medal winners, including special pension, burial in Arlington National Cemetery, and special priority for their children to enter military academies). As the government ably demonstrates, when a servicemember sees a comrade-in-arms being awarded a medal, he or she knows that there are internal investigations, checks, and limitations that make that award meaningful, and respect to the honoree naturally flows. False claims do nothing to impede the military's ability to take those steps. Gov't Br. 40-41.

In light of the measures the military takes to reward honorees within its ranks, it is simply ludicrous to believe that false claimants are truly standing in the way of the government's attempt to ensure that medals are meaningful. In other words, "[i]f the Stolen Valor Act is struck down, military medals will still maintain their power to express our nation's gratitude to true heroes, and to foster morale within

the military." Br. for Volokh & Weinstein, as *amici curiae* for petitioner ("Volokh Br."), at 32-33 (rejecting the government's claim of a compelling government interest). In light of these facts, it seems clear that the motivating factor behind this law and the true interest it protects is to avoid the offense that is experienced by real medal winners and those in society who – rightly – are offended when others try to appropriate honor and gratitude they do not deserve. While perhaps appropriate sentiments, such reasons are not sufficiently compelling to curtail speech.

To support its claim of a compelling interest, the government offers only that "it is common sense that false representations have the tendency to dilute the value and meaning of military awards." Gov't Br. 54. This is not enough. "[T]he Government must present more than anecdote and supposition"; it must prove "an actual problem." *Playboy Entertainment Group*, 529 U.S. at 822. Moreover, it is not enough to say that false claims are prevalent in society, or even that false claims have the possibility to dilute; the government must show that false claims have such a serious impact on morale that the problem rises to the level of a compelling interest. This it failed to do. While protecting the reputation of military decorations is not an illegitimate government pursuit, it is certainly not compelling and does not pass muster here.

2. Even if a compelling interest exists, criminalizing false claims to receipt of military decorations is not the least restrictive means necessary to achieve that interest.

A law is not narrowly tailored when less speech-restrictive means exist to effectively achieve the interest. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997). There is no reason to think that criminal prosecution is necessary to ensure that false claims of military decorations will not dilute the meaning of such awards.[4] In addition to the reasons discussed above, the government has at its disposal numerous less-restrictive alternatives to satisfy its interest. It can create a publicly-searchable database that would allow for immediate verification of awards claims. The military can redouble its efforts to honor and timely reward medal recipients. *See Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House*

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[4] The government suggests that it will use "carefully chosen prosecutions – where the government can prove that the defendant's claim was false and that he was aware of its falsity – to deter all knowingly false claims to have received military honors." Gov't Br. 55. But this Court has repeatedly rejected the suggestion that prosecutorial discretion can serve as a substitute for the Court's protection of First Amendment rights. *See, e.g., Stevens*, 130 S. Ct. at 1591 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

Comm. on Armed Services, 109th Cong., 2d Sess. 6 (2006) ("Excessive delay is the Medal's worst enemy."). The government could publicize the names of false claimants and embarrass those individuals as frauds, a task that currently is shouldered primarily by private citizens. It could create educational programs to teach the citizenry why these decorations are important, and what servicemembers have done to receive them. It could recommend enhancements in the United States Sentencing Guidelines for those who commit fraud while falsely claiming military honors. The Act could be more carefully circumscribed, to criminalize only false claims made in an attempt to obtain a "thing of pecuniary value." And the Executive could use existing fraud statutes to target individuals who wrongly obtain government benefits by posing as veterans or as medal winners. The government has offered no answer to any of those suggestions, let alone any evidence that such measures would be inadequate. Congress chose instead to leap to the extreme option of criminal prosecution. *Cf. Reno*, 521 U.S. at 872 (criminal sanctions pose greater First Amendment concerns than those implicated by civil regulation).

Finally, and perhaps most importantly, there is no reason to believe that counter-speech – public refutation of false claims – cannot adequately protect the government's interest. "Whenever compatible with the underlying interests at stake, under the regime of [the First Amendment], we depend for correction not on the conscience of judges and juries

but on the competition of other ideas." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (citations omitted). That is, wherever possible, the preferred remedy for false speech is *more speech*. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). When a false claim to an award is exposed as a self-aggrandizing lie, scandal results and the media flocks. These imposters lose their jobs, lose their standing in the community, and suffer long-term embarrassment and shame. *See, e.g.*, VFW Br. 13-15 nn.19-34, and articles cited therein. If the prospect of public ridicule in the press and the attendant likelihood of losing jobs and social status does not deter, it is hard to imagine that the relatively small chance of being prosecuted will.

The government argues – and appears primarily to argue – that public refutation is inadequate and many false claims will go undiscovered because creation of a publicly accessible database of medal recipients is impracticable and its data would be insufficiently comprehensive. Gov't Br. 50, 55.[5] It derives this notion from a Department of Defense (DoD) report to Congress. *Id.* at 50 (citing Office of the Under Sec'y of Defense, *Report to the Senate and*

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[5] This claim is curious, as the government also maintains that no chilling effect would result from the Act because "any false claim is objectively verifiable." Gov't Br. 47.

House Armed Services Committees on a Searchable Military Valor Decorations Database 5-8 (2009) (*Decorations Database*).

But the government overstates the barriers to a database. The Congressional Medal of Honor Society already maintains a database of Medal of Honor recipients – the medal at issue in this case – that can be accessed instantaneously to settle any doubts about a claim. Gov't Br. 40. With respect to other medals, the DoD concluded that a database was feasible but unnecessary because most of the information was already available to individuals who made public records requests. *Decorations Database* 7. That is, it did not consider whether such a database was worthwhile because it permitted the public – even those without sufficient motivation to make a public records request – to quickly verify medal claims.

Moreover, a response to the DoD report by Douglas Sterner, a veteran and leader of the Stolen Valor movement, shows that a complete database is not only possible but entirely practicable. *See generally*, C. Douglas Sterner, *Response to the Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database* (2009) (*Sterner Response*), www.reportstolenvalor.org/pdf/Sterner%20HR%20666%20Response.pdf. Using only FOIA requests and private funds, Sterner has created a database – routinely relied on by the FBI – that was "considered 99% complete for the top three levels of awards (Medal of Honor, Distinguished Service Cross,

Navy Cross, Air Force Cross, and the Distinguished Service Medals), and . . . 75% complete [for Silver Stars] for all wars and all branches of service." *Sterner Response* 1; Christian Davenport, *Exposing Falsified Valor: One Man's Database Helps Protect Medals' Integrity*, Wash. Post, May 10, 2010, at A1 (quoting FBI agent who investigates false military claims and uses Sterner's database as his "first source"). Sterner also refutes the DoD's argument that a 1973 fire, which destroyed millions of military records, rendered a complete database impossible. Because "the military is redundant in paperwork," nearly all of the relevant information is also at the National Archives and Records Administration; it will just take work to index it. *Sterner Response* 5-6. The problem, in Sterner's view, is not that a comprehensive database cannot be created, but that "it has fallen to private researchers to insure that the men and women who receive awards from our military branches are never lost to history." *Sterner Response* 7. Thus, contrary to the government's primary argument, a comprehensive, searchable database of awards recipients is practicable, if only Congress wanted to create it.

And, in Sterner's experience, a searchable Internet database would decrease false claims. He explained that since the Medal of Honor database became available online, he "encounter[s] a false claim to the Medal of Honor only a few times each year, and reports to the F.B.I. have also dropped dramatically . . . because [individuals can easily] verify a Medal of Honor claim with a quick Internet

search." *Sterner Response* 2. If a database would be effective to reduce false claims, the government cannot leap to criminalization.

The government also claims that the public is insufficiently motivated to root out all military claims. But it ignores that an Internet database would drastically decrease the motivation required to verify claims, much in the same way that Google permits individuals to chase down even idle curiosities that they might never go to a library to research. This too answers the government's concern about a skeptical public, Gov't Br. 42, which is hardly a compelling problem if one's doubts can quickly and easily be resolved. And, it warrants mention, that the Founders were far more concerned about a government that selected truth and falsity for its constituents than a public prone to skepticism that investigated and decided truth for itself. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

The fact is, false claims of military decorations have not gone unnoticed or unchallenged. It was no doubt the public exposure of such claimants that spurred Congress to believe that the Stolen Valor Act was necessary. Certainly, public exposure of those who have falsely claimed to have received a military decoration is sufficient to protect the meaning of the medal to true military honorees. Accordingly, because the government entirely failed to show – and is plainly unable to show – that the Stolen Valor Act

satisfies strict scrutiny, the law is facially unconstitutional.[6]

B. The Act Does Not Have The Limited Meaning The Government Ascribes To It.

The government's view of the Act is also flawed because it rests on faulty assumptions about the statute's scope. The government reads into the law a scienter requirement where there is none, and assumes the statute does not cover "parody, satire, hyperbole, performances, and any other statement that cannot reasonably be understood as factual claims." Gov't Br. 17. This is not rewriting the statute, it claims, because these elements are implicit in the phrase "falsely represents."

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[6] The court of appeals also indicated that the "clear and present danger" test might be better authority "for defining the relevant subset of false speech that is historically unprotected." Pet. App. 32a-35a (discussing, *e.g.*, *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."). It suggested that courts could "articulate the class of false factual speech unprotected by the First Amendment to be that false factual speech which creates a clear and present danger." Pet. App. 32a-33a. It concluded that because "the speech targeted by the Stolen Valor Act does not pose any immediate and irreparable harm[, and] any harm it does cause can be remedied by more speech," the Act fails this test also, and is thus unconstitutional. Pet. App. 35a.

The first assumption is, perhaps, tenable. "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951); *see also Morissette v. United States*, 342 U.S. 246, 250-52 (1952). As such, this Court has often read a mens rea element into the law despite Congress's failure to explicitly include one, *see, e.g.*, *Staples v. United States*, 511 U.S. 600, 605-06 (1994); *Morissette*, 342 U.S. at 250-52, and certainly the Court could do so here, if that would save the statute.[7]

Further afield, however, is the government's suggestion that "represents" can be read to exclude all manner of statements that cannot reasonably be understood as factual claims. This reads a lot into one word. The government says represents means "to place (a fact) clearly before another; to state or point out explicitly or seriously to one, with a view to influencing action or conduct." Gov't Br. 16 (citing the *Oxford English Dictionary* (2d ed. 1989)). But the ordinary meanings of "represent" include "to depict, portray," "to describe evoke, conjure," "to portray in an artistic medium or by artistic means," "to depict by

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[7] The one district court case (other than this one) upholding the Act did so *only* because it "conclud[ed] that the statute should be read to include a mens-rea requirement that the defendant *intended to deceive*." *United States v. Robbins*, 759 F. Supp. 2d 815, 819 (W. D. Va. 2011) (emphasis in original). The government apparently does not ask the Court to read in an element of intent to deceive or to defraud.

acting or miming; to perform or produce on stage," "to present in words; set forth; describe; state." *See Oxford English Dictionary* (3d ed. 2009). In fact, the government's proffered definition does not appear in the current edition of the Oxford English Dictionary. The closest equivalent excises "seriously" – the word on which the government presumably rested its argument for excluding satire – in favor of a new definition: "to set out clearly" or "submit formally . . . with a view to influencing action or opinion." It moves even that definition far down on its list of accepted meanings. *Id.*[*]

But perhaps the greater linguistic offense is the government's attempt to read its chosen dictionary definition as excluding satire, hyperbole and the like. Even accepting the government's definition, *arguendo*, satire is precisely a false fact presented to another as truth, often with a view to influencing action or conduct, and quite often seriously. As the court of appeals explained, "[s]atirical entertainment such as The Onion, The Daily Show, and The Colbert Report thrives on making deliberate false statements of fact." Pet. App. 31a. Indeed, "Colbert relies on deadpan, a specific type of satire that uses a straight-faced approach to joke telling[,] . . . [he] rarely breaks character and maintains a level of seriousness as he parodies conservative pundits." Heather L. LaMarre

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[*] Indeed, the range of definitions for "falsely represents" is so broad as to suggest the Act is impermissibly vague.

et al., *The Irony of Satire: Political Ideology and the Motivation to See What You Want to See in* The Colbert Report, 14 Int'l J. Press/Politics 212, 216 (2009). Satire thus would appear to fall in the heartland of the dictionary definition the government selected.[9]

As written, the Stolen Valor Act criminalizes even those statements that are plainly incredible and not worthy of actual belief.[10] The Act applies to innocent bragging. It includes parody and satire. But "whether it be method actors getting into character, satirists being ironic or sarcastic, poets using hyperbole, or authors crafting a story, creative persons often make factual statements or assertions which, as they are fully aware, are entirely untrue. Such creative uses of knowingly false speech are highly

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[9] Even if satire is excepted, the government apparently feels comfortable assuming that prosecutors will always get the joke. But individuals often recall satirical statements literally and "assume th[e] message was true," particularly when it suits their ideological view. LaMarre, *supra*, at 228. LaMarre's study showed that "conservatives were more likely to report that Colbert only pretends to be joking and genuinely meant what he said while liberals were more likely to report that Colbert used satire and was not serious when offering political statements." *Id.* at 223.

[10] Alvarez often "invent[ed] stories, usually to kid people or to brush them off." Ninth Cir. Excerpts R. 19. He told such stories to make people think he is a "psycho from the mental ward with Rambo stories." Pet. App. 4a. At sentencing, the district court indicated that Alvarez's stories completely lack "credibility" and might be related to "a psychological" or "alcohol" problem. Pet. App. 5a; Ninth Cir. Excerpts R. 65, 67.

protected." Pet. App. 32a. This Court's job is not to rewrite statutes in the image preferred by the Executive; it is to interpret the language that Congress provided. It cannot do so by twisting the language of the statute beyond recognition.

II. THE GOVERNMENT MERELY REPACKAGES A TEST THAT WAS RIGHTLY REJECTED IN *STEVENS* AND SIGNIFICANTLY UNDERVALUES FALSE STATEMENTS OF FACTS.

In contrast to the straightforward, well-grounded strict scrutiny analysis, the government proposes that false statements of fact can be criminalized if the government has a strong or important interest and if "breathing space" is left such that the law does not impinge on fully protected speech. *See* Gov't Br. 18, 36, 46, 52. Moreover, it argues that even where a law limiting false statements does intrude on speech that matters, the law may nevertheless be saved if it reaches no farther than is necessary. Gov't Br. 37, 49. It is not clear whether the government would have this Court declare that false statements that cannot pass its test are a new category of unprotected speech, or whether it asks this Court to create a special rule of "limited protection" for false statements of fact. Either way, what the government attempts to do is "startling and dangerous" and ignores the lessons of *Stevens*.

A. The Government's Test Calls For Evaluating The Value Of Speech Against The Government's Interest In Curtailing It.

In *Stevens*, the government argued that new categories of unprotected speech can be generated based on "a categorical balancing of the value of the speech against its societal costs." 130 S. Ct. at 1585. The Court called such a test "startling and dangerous." *Id.* The First Amendment "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.* While *Chaplinsky* stated that certain categories of speech were "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'" this language was merely descriptive, and was not to be taken as a test for generating new categories of unprotected speech. *Id.*[11] The unprotected status of the categories of speech listed in *Chaplinsky* flowed from the speech being viewed as historically outside First Amendment protection, not because it survived an ad hoc balancing test. *Id.*

Against this backdrop, the government appears to acknowledge that it would be an uphill battle to

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[11] Indeed, this Court has not recognized any new areas of unprotected speech for 25 years, and even the existing categories of unprotected speech have been consistently narrowed. *See R.A.V.*, 505 U.S. at 383 ("[This Court's] decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation and obscenity.").

have "false statements of fact" designated a category of *unprotected* speech. It concedes that "the broad general category of false factual statements has not historically been treated as completely unprotected by the First Amendment." Gov't Br. 19. It instead offers a test for false statements that would result in "at most" limited protection for false statements that pass its test. This proposition is startling and dangerous in its own right. As discussed above, this Court has made clear that a content-based restriction on speech is subject to strict scrutiny if it does not fall within a category of unprotected speech by virtue of its historical pedigree. The government cites no other examples of "limited protection" categories; it apparently believes that false statements of fact are so low value as to require their own unique application of the First Amendment.

Before returning to the value of false speech, however, it is important to call this test what it is: a return to elements of the test the government offered in *Stevens*. In *Stevens*, the government proposed balancing the societal costs versus the First Amendment value of speech; here, the government is somewhat more modest, in that it asks the Court to evaluate *false factual statement laws* in light of the government interest and breathing space for the First Amendment. But the two tests share an essential feature: Once again, the government asks the Court to declare a category of speech outside the realm of full First Amendment protection, not because it has always been thought to be outside the protection of the Free Speech Clause, but because the government

believes it to be valueless. And, once again, the government would say that valueless speech can be criminalized if society's interests are sufficiently weighty in the balance. For the same reasons such a test was rejected in *Stevens*, it should be rejected here.

A grounding principle of the First Amendment is to put speech beyond the whim of fickle majorities and "limits dictated by expediency, political opinion, [and] . . . other legislative desideratum." *Beauharnais v. Illinois*, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting). For this reason, a test that weighs harms and values – whether the weighing is conducted by legislatures or judges – is incongruous with the First Amendment. *See Stevens*, 130 S. Ct. at 1585. A test focused on historical pedigree, rather than on the evaluation of harm and value, ensures that First Amendment protection is withheld only from those categories of speech that the Constitution was never thought to protect, not simply from any speech that a present majority of legislators or judges deems insufficiently valuable to protect.

The government's test is thus laid bare: it attempts to sidestep the requirement of historical grounding and, at the same time, to avoid the rigors of strict scrutiny. In the place of these pillars, the government would create a test that replaces strict scrutiny's requirement of a "compelling" state interest with a test that requires only an "important" government interest. Gone entirely is the requirement of fit – rather than worrying about whether restriction on speech is closely hewn to the interest, it would permit

the legislature to be as sloppy in its line drawing as it wants, so long as a law did not impinge on "fully protected speech," which, apparently, it would limit to true facts and opinion. Knowing that it can no longer seek "unprotected" status without some historical foundation, it instead seeks the status of "at most limited protection" for its newly created category. But it would eviscerate strict scrutiny and the requirement of a historical pedigree for categories of unprotected speech if the government could get around both requirements by simply creating a new category of "limited protection" for speech it believed was not valuable. What the government asks for is unprecedented and seeks to avoid the two standards by which content-based laws have been measured – historical pedigree and constitutional scrutiny – and replace it with a freewheeling weighing of harm and First Amendment value. This Court should reject any move in this direction.

B. To Say That False Speech Can Be Limited Except Where It Has Some Derivative Value For Promoting "True Speech" Significantly Undervalues False Speech.

The government presumes that its test should succeed where *Stevens* failed because it believes false statements of fact are not valuable *per se*. Indeed, its test collapses unless the Court accepts that the only reason to protect false factual statements is, derivatively, to protect other more valuable speech. Certainly this Court has made passing statements to this

effect. *See, e.g.*, *Gertz*, 418 U.S. at 340. At the same time, the Court has never had to consider the value of false speech in its purest form – where there was no history of criminal or civil liability and where the purported harm is to reputation of a government symbol, not harm targeting an individual. *Cf. Nike v. Kasky*, 539 U.S. 654, 664 (2003) (Stevens, J., concurring in dismissal of cert.) (noting that the Court has "(perhaps overbroadly) stated that 'there is no constitutional value in false statements of fact'"). Before relegating false statements of fact to second-class status, and before creating a balancing test with broad implications, it is important to step back from the case at hand and examine the myriad reasons why false statements are valuable.

First, this Court has recognized that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Sullivan*, 376 U.S. at 279 n.19 (citing John Stuart Mill, *On Liberty* 21 (Bantam Classic ed. 1993) (1859); John Milton, *Areopagitica*, in *Areopagitica and Other Prose Writings* 22 (E. Rhys ed. 1927) (1644). In its most classic exposition, Mill wrote that a person can be confident in his own concept of truth only if it "has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound . . . the fallacy of what was fallacious." Mill, *supra* at 25. Many ideas now considered true were once considered false, even heretical, and currently held truths can

only evolve where there is "a standing invitation to the whole world to prove them unfounded," including by making statements that most people at the time believe to be false. *Id.* at 26. *See also* Thomas Cooper, *A Treatise on the Law of Libel and the Liberty of the Press; Showing the Origin, Use and Abuse of the Law of Libel* 6 (1830) ("[D]iscussion of any opinion, generally brings out many important truths collaterally which would never have been known or attended to if the discussed fallacy had not been advanced."). For this reason, it is important that the barriers to entry into the marketplace of ideas be kept low, and not turn on the perceived falsity – or even knowing or suspected falsity – of the statement.

While this rationale is perhaps best known, it is not the only reason for protecting false speech. Limitations on false statements of fact also impinge on the First Amendment's role in promoting autonomy, and specifically, the right to be "master of the identity one creates in the world." Laurence H. Tribe, *American Constitutional Law* 887-88 (1978). This Court has recognized that the right to autonomy is not protected for instrumental reasons; rather, the "freedom to speak one's mind is . . . an aspect of individual liberty – and thus a good in itself." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-04 (1984); *First Nat'l Bank v. Belotti*, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion.").

In particular, human beings are constantly forced to choose the persona we present to the world, and our choices nearly always involve intentional omissions and misrepresentations, if not outright deception. College students portray different personae to their parents, their professors, and their peers. Individuals lie about everything, from things as trivial as their weight, to things as fundamental as their sexual orientation. Such deceptions are part of the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Indeed, in protecting autonomy, the constitutional protections for freedom of religion, speech, and press form a barrier against government interference with the process through which the individual develops his or her intellectual capacities and emotional life. *See, e.g.*, Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 Calif. L. Rev. 1159, 1164-65 (1982). Falsehoods are therefore indistinguishable in value from other speech because they facilitate the development of critical thinking and because their utterance represents an aspect of self-determination. *Cf.* Alexander M. Bickel, *The Morality of Consent* 62 (1975) ("The social interest that the First Amendment vindicates is the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is

founded in truth."). While the right to autonomy is not absolute, this Court has consistently recognized that the right to "think as [one] will and speak as [one] think[s]," *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring), is an important goal of the First Amendment, and the right to define oneself to the world is an important component of that goal.

In addition to lies about ourselves, there is a class of lies told about others and about the world that is generally viewed as socially useful. These range from the important – Kant's hypothetical of lying to a person intent on murdering about the whereabouts of his would-be victim – to the mundane – lying to one's spouse about whether an outfit is flattering.[12] Such lies are part of the fabric of our socialization, so innate as to be a milestone in child development and a feature of most everyone's daily lives. *See* Victoria Talwar & Kang Lee, *Development of Lying to Conceal a Transgression*, 26 Int'l J. Beh. Dev. 436, 439 (2002) (concluding that a majority of children age four will lie to avoid admitting they violated a rule, with that number steadily increasing as children age); Jochen Meckel, *Cultures of Lying* 8 (2007) (estimating that Americans tell somewhere

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[12] Indeed, "[t]he wheels of society undoubtedly run more smoothly because the wearers of hideous ties and youngsters in dance recitals are generally assured by others that their taste or performances are impeccable." Dianne M. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. Rev. 364, 426 (1989).

between two and fifty lies each day). The pervasiveness of such lies should give this Court pause before balancing away the value of such lies as merely "derivative" in the search for truth.

Knowingly false statements also have secondary meanings that are valuable, apart from the content of the speech itself. Lies often betray to the listener that we are trying to flatter them, that we are clumsily trying to avoid causing them pain, that we are trying to show allegiance with a group, and other secondary meanings. In this sense, many false statements reveal important truths about the world, apart from their content. Indeed, a person listening to Alvarez could infer that Alvarez was willing to lie about himself to get ahead, that his easily disproved lie meant that he was unsophisticated, that some mental pathology was afoot, or that his desire to impress caused truth to fall to the wayside. Such lessons are not valueless.

To err and exaggerate in heated discussions, to define oneself to the world, to smooth over social situations, and to play devil's advocate are all part of who we are. To say that lies are only important to the extent that limiting them might impede the search for valuable speech grossly distorts the role lying plays in our daily lives.

And, in fact, many of the lies discussed here would not pass the government's test if lies were protected only where the government could conjure no important interest or where banning the speech

would chill true statements of fact or opinions. Perhaps a government could not state a sufficient harm to criminalize lying about one's weight. But it is not impossible to imagine a legislature that viewed the value of strong marriages and the harm caused by adultery as sufficiently important to prohibit lying about extramarital dalliances. Or one that viewed the potential danger of strangers meeting over the Internet as significant enough to permit prosecution for factual lies or exaggerations in dating profiles. *See Cybersecurity: Protecting America's New Frontier: Hearing Before Subcomm. on Crime, Terrorism, and National Security* 7 (2011) (statement of Richard W. Downing, Dep't of Justice) (arguing that violation of website's terms of service should continue to be a crime); *United States v. Drew*, 259 F.R.D. 449, 454 (C.D. Cal. 2009) (prosecution under Computer Fraud and Abuse Act for a fictitious MySpace profile where website's terms of service required that "all registration information [be] truthful and accurate"). Or one that viewed the integrity of the state's hiring process as so important that any factual lies on one's resume were punishable by criminal prosecution. Or one that viewed the integrity of elections to require truth-telling at all moments by all candidates for election. *See Rickert v. State Pub. Disclosure Comm'n*, 119 P.3d 379, 387 (Wash. 2005) (en banc) (striking down a statute that prohibited knowingly false statements by candidates for office). And certainly, Congress, concerned about a distracted President during a time of war, might make it a crime to falsely represent that the President is not "a natural born citizen" of the

United States. Each of these laws would seem to be supported by a government interest and would not trample true speech or opinion. In other words, the prospect of such laws if the government prevails is not as remote as the government claims.

Other countries make it a crime to deny the Holocaust or the Armenian genocide. It has generally been believed that such a law would not be permissible under the First Amendment, *see, e.g.*, Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1, 3 (2008), but it would seem to pass the government's test: the government has an interest in ensuring that such tragedies are not repeated, which is hindered if some percentage of the population does not believe it occurred, and a law forbidding people to deny particular facts of the Holocaust that are beyond reasonable dispute – such as that six million Jews died – certainly does not threaten true facts or opinions.

Indeed, if the government wishes to suppress a particular form of lying, it would be the rare case where the government could not phrase its concern in terms of some "important" interest or concern of societal harm. If this, together with "breathing space" for "fully protected" speech, were the only limitation on a government's authority to prohibit lying, it would provide only illusory protection for speech. As the court of appeals concluded, "in nearly *every* case, an isolated demonstrably false statement will [ ] not be considered 'necessary' to promoting core First Amendment values." Pet. App. 12a. But the "right to

speak and write whatever one chooses – including, to some degree, worthless, offensive, and demonstrable untruths – without cowering in fear of a powerful government is . . . an essential component of the protection afforded by the First Amendment." Pet. App. 14a.

This is not because all false facts are good in and of themselves, or because all of the above rationales will apply in every case, but because the cure is worse than the cold. To place the government in judgment, not only of truth and falsity, but of which lies are worth protecting and which should be prosecuted (and where to draw the line between false fact and opinion) is worse than a proliferation of worthless lies. Gey, *supra*, at 21-22; *Cohen v. California*, 403 U.S. 15, 21-25 (1971); *see also United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.) ("The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."). This is because "once force is thrown into the argument, it becomes a matter of chance whether it is thrown in on the false side or the true." Zechariah Chaffee, *Free Speech in the United States* 31 (1941); *see also* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. Rev. 897, 918 (2010) (concluding that, if the First Amendment renders the law "toothless to deal with the problem of public factual falsity," it is because "it was designed to serve a quite

limited purpose in preventing government suppression, rather than serving as a guarantor of the accuracy" of public debate). Just as the Free Exercise Clause of the First Amendment includes government agnosticism among religious viewpoints, the Free Speech Clause also prescribes a certain agnosticism, at least to the extent that it prohibits using the law to enforce the government's view – of fact or opinion – on those who disagree. Gey, *supra*, at 18, 21.

This brings the argument full circle. The government's proposed test starts from the premise that false speech can be prohibited unless it is necessary to promote "valuable" speech. Little speech, even true speech, could meet a test that required it to prove its First Amendment worth. But, as *Stevens* makes clear, the balancing has already been done: "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." 130 S. Ct. at 1585. False statements of fact are not so valueless that they should be protected only if they can pass the government's credentialing test.

C. The Court Has Only Relied On A Breathing Space Analysis To Provide A Measure Of Protection For Unprotected Speech, Not To Sanction Laws Limiting False Statements More Broadly.

The government reviews this Court's precedents and concludes the Court has, in fact, been applying a

"breathing space" test for false factual statements all along. But the government mistakes the role that "breathing space" plays in the cases it cites. This Court has frequently applied a "breathing space" analysis to laws that restrict defamation, fraud, and the like, that is, speech that is unprotected because its prohibition has, throughout our Nation's history, never been thought to be a constitutional problem. In those contexts, it makes sense that "breathing space" for protected speech is all that is required to satisfy the First Amendment. But the government is on thinner ice when it tries to extrapolate from these examples a general rule that breathing space is sufficient protection for false factual statements laws outside the context of unprotected speech. The examples it cites, on close examination, demonstrate that "breathing space" is insufficiently protective of speech except in very narrow circumstances.

1. This Court has never held that falsity is a sufficient condition to impose criminal liability, and should not do so here.

A brief survey of unprotected areas proves this point. Defamation was criminalized long before the First Amendment was penned. At common law, the "malicious defamations of any person" was prohibited, and was defined as statements made "in order to provoke [a person] to wrath, or expose him to public hatred, contempt, and ridicule," where "[t]he direct tendency of these libels is the breach of the public

peace, by stirring up the objects of them to revenge, and perhaps to bloodshed." 4 William Blackstone, *Commentaries on the Laws of England* 150 (1769). In other words, libel suits gave individuals a way to defend their honor and reputation through the courts rather than on the dueling field. Until 1964, the First Amendment had not been interpreted as a significant limit on defamation laws. *See, e.g.*, *Patterson v. Colorado*, 205 U.S. 454, 462-63 (1907). In *Sullivan*, however, the Court stated that its prior precedent had not ceded its authority to "nullify action which encroaches on freedom of utterance under the guise of punishing libel." 376 U.S. at 268 (citation omitted). It therefore concluded that existing defamation law did not sufficiently protect speech on public questions. *Id.* at 269-75. Because erroneous statements were inevitable in spirited debate, they must be protected by a requirement of scienter "if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Id.* at 271-72 (citation omitted). Similar statements in *Gertz* refined *Sullivan*'s rule but did not change its essence: even though defamation was historically unprotected, laws concerning defamation cannot chill core First Amendment speech. *Gertz*, 418 U.S. at 340-44.

Fraud laws count among, perhaps, the oldest prohibitions, *see, e.g.*, The Code of Hammurabi § 265, at 48 (L.W. King trans., NuVision Publications 2007) ("If a herdsman, to whose care cattle or sheep have been entrusted, be guilty of fraud and make false returns of the natural increase, or sell them for

money, then shall he be convicted and pay the owner ten times the loss."), and were certainly part of the common law tradition received from England. Fraud's prohibition has always been part of the fabric of our criminal laws. *See, e.g.*, *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"). Nevertheless, this Court has required the elements of scienter, materiality and reliance so as to leave breathing room for the First Amendment in the context of fraud laws. *Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003).

A prohibition on perjury, likewise, was part of the legal tradition inherited from England and recognized in the colonies. *See* Michael D. Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 Am. J. L. Hist. 145, 146 (1980) (discussing the Perjury Statute of 1563); 1 *Colonial Laws of New York, 1664-1719*, ch. 8, pp. 129-30 (1894) (reprinting "An Act to prevent wilfull Perjury" (enacted Nov. 1, 1683)). The Court has said in passing that perjury is not fully protected, *Konisberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961), and certainly a good case could be made that it is one of the unrecognized but historically grounded categories of unprotected speech to which *Stevens* alludes. But perjury, too, generally requires scienter and materiality, not to mention an oath, all of which could be seen as securing breathing space for the First Amendment. *See, e.g.*,

18 U.S.C. § 1621; *Johnson v. United States*, 520 U.S. 461, 465-66 (1997).

In each of these examples, "breathing space" is clearly a limitation on an area of unprotected speech. But, the government would claim, other examples demonstrate that the application of the "breathing space" test is not limited to areas of unprotected speech.

The government points to the torts of intentional infliction of emotional distress (IIED) and false light privacy as examples of the application of the breathing space test outside the area of historically unprotected speech. While the Court in both *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988), abjured any claim that its decision was a blind application of defamation law, false light privacy and IIED torts are more similar to defamation than different. Indeed, William Prosser, in the article that first established the taxonomy of privacy torts, said of false light claims "[t]he interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation." William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 400 (1960), *quoted in Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Where a defamation claim is stated, a plaintiff can recover for harm to reputation as well as any emotional harm. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976). Likewise the false light tort permits damages for harm to reputation and emotional harm. *See* Restatement (Second) Torts § 652h, cmt. a, b (1977).

While false light, IIED, and defamation are often said to cover slightly different interests – an objective interest in one's reputation as opposed to a subjective interest in avoiding injury to one's emotional sensibilities – the difference is illusory in most cases. *See Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100, 1105 (Fla. 2008) (declining to recognize false light as a tort because it "is largely duplicative of existing torts" "both in the conduct alleged and the interests protected"); *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 902 (Colo. 2002) (same, because "the same publications that defame are likely to offend, and publications that offend are likely to defame"); *see also* J. Clark Kelso, *False Light Privacy: A Requiem*, 32 Santa Clara L. Rev. 783, 785 (1992) (concluding, after reviewing over six hundred false light cases, "there is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law," predominantly because it generally duplicates defamation or IIED). While hornbook law is that the speech underlying a false light tort or intentional infliction of emotional distress need not be defamatory, the similarities in these torts counsel in favor of permitting false light claims and IIED to lay claim to defamation's historical pedigree for the purposes presented here.[13]

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[13] One of the government's examples – baseless lawsuits – requires significantly less exposition. In *Bill Johnson's Restaurants, Inc. v. NLRB*, the Court said that liability for baseless lawsuits was analogous to false statements, *i.e.*, "[j]ust as false

The government also counts "demonstrably false campaign promises" among the applications of its false statements test. Gov't Br. 26. But *Brown v. Hartlage* is a much narrower case. It involved Kentucky's law prohibiting the buying of votes. 456 U.S. at 49. Because paying consideration in exchange for a vote is illegal, *offering* to pay consideration for a vote is speech integral to illegal conduct – another historically unprotected area. *See Chaplinsky*, 315 U.S. at 572. Thus, in many applications, the law limits entirely unprotected speech. *Hartlage*, 456 U.S. at 54-55. But a candidate's promise to reduce his salary if elected is "different in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment." *Id.* at 56-57. That is, it was inconsistent with the First Amendment to prohibit all promises that could be seen to have a remote impact on voters' bottom line; it is perfectly acceptable and indeed common, for people to vote for candidates they think will make their personal lives better. This use of breathing space, like

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statements are not immunized by the First Amendment right to speech, baseless litigation is not immunized by the First Amendment right to petition." 461 U.S. 731, 743 (1983). The government tries to parlay this statement into an additional example where this Court, *sub silentio*, applied its test. *See* Gov't Br. 27-28. But *Bill Johnson's* was merely recognizing that both the right to speech and the right to petition (the constitutional provision at issue there) are not absolute. In no other respect does a frivolous lawsuit resemble a false statement of fact; indeed frivolous lawsuits are often based on true facts for which there is no viable legal theory.

the other cases discussed above, can be seen as nothing more than a limitation within an historically unprotected area.[14]

The government and *amici* Volokh & Weinstein present numerous other examples of laws concerning false statements or false representations. Gov't Br. 21-28; Volokh Br. 3-11. Many of those laws, however, have not been passed on by this Court in the First Amendment context, and thus do not shed light on this Court's doctrinal development in this area. Some of those laws may fall under historically unprotected areas, some may pass strict scrutiny,[15] or – particularly in the case of state laws – the analysis of some laws is not sufficiently developed to read much into their existence.[16]

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[14] The real battlefield is not vote-buying statutes, but state-level "truth-in-politics" laws. *See* Volokh Br. 11. For example, in Ohio, a right-to-life group is currently being sued for saying that a candidate's vote for "Obamacare" was a vote "for taxpayer funding of abortion." *See* George Will, *Who Gets to Judge Political Truth?*, Wash. Post, Nov. 13, 2011, at A21.

[15] Although some have questioned the constitutionality of the federal false statements law, 18 U.S.C. § 1001, *see* Steven R. Morrison, *When is Lying Illegal?*, 43 J. Marshall L. Rev. 111, 112 n.2 (2009) (collecting articles), the law, if properly interpreted, may well meet strict scrutiny. But the Court need not decide that issue here.

[16] *Amici* Volokh & Weinstein would place falsehood in a category of unprotected speech, subject to exceptions for opinions, mistakes, and negligent falsehoods, and – more troubling – falsehoods that involve "an unusually high risk of fact-finding error, factfinder bias, prosecutorial bias, legislative bias, or

It is thus clear that the government is wrong when it says this Court has applied a breathing space test to false factual statements, apart from those limited false statements that fall under unprotected categories. But the Court need not accept a unitary theory of free speech in order to decide this case. What is absolutely clear is that this Court has never punished "falsity in the air." Defamation loses its protection not merely by virtue of the fact that it encompasses false speech, but by falsity "*and* by its alleged defamation of [the plaintiff]." *Sullivan*, 376 U.S. at 271. Fraud loses its protection by its falsity *and* by the fact that it steals money or a valuable thing from another. But falsity, alone, without any proof of specific harm, has never stripped speech of its protection; courts have "consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials." *Id.* A statute that criminalizes the mere utterance of a falsehood cannot stand under this Court's precedent.

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interference with scientific or historical investigation." Volokh Br. 23. This is a difficult boundary to police. First, it should be viewed with skepticism that *judges* will be able to sniff out these sorts of biases better than legislatures, and that they are above their own biases about what kind of speech they would prefer. Gey, *supra*, at 21-22 (expounding "the First Amendment['s] . . . deep skepticism about the good faith of those controlling the government"). Second, if scientific and historical investigation is excepted because it is uncertain, outside the speaker's knowledge, and may be politicized, Volokh Br. 24, it is both underinclusive and overinclusive as a category.

2. The government's test accepts a kind of harm categorically different from any this Court has previously examined.

The government's test is novel, not only for its suggestion that areas of speech not historically protected can be criminalized on a showing of "important" governmental interest, but in accepting the nebulous harm that this case presents. The Stolen Valor Act was aimed at protecting the reputation of military medals by preventing dilution of the honor bestowed on a large group of individuals, an interest different in kind from the harms reached by defamation, fraud, perjury, and other traditionally covered areas.

The government has always had a legitimate interest in protecting its citizens from individualized harm – pecuniary harms, assaults on their person, and harm to their standing in the community. Mill, *supra*, at 12 ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). To this end, since early in our history, the freedom of speech has been read to be "the right of every man, *as far as by it he does not hurt and control the right of another*; and this is the only check which it ought to suffer, the only bounds which it ought to know." Cato's Letters (Letter No. 15, Feb. 4, 1720) (emphasis added). Under this theory, defamation and deception are "actionable wrongs . . . [because they] vindicate private rights invoked by, or at least on

behalf of, private individuals." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 238 (1992). But falsehood, it has long been held, is not stripped of protection as long as it does not cause another individual specific harm. *See* Thomas Cooley, *Constitutional Limitations* 886 (8th ed. 1927) (noting, in his 1868 treatise – which this Court has called "massively popular" and "influential" – that freedom of speech "implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications . . . as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals."); Frank Mott, *Jefferson and the Press* 14 (1943) (attributing to Thomas Jefferson, "The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty or reputation of others. . . .").

The government argues that the false claims criminalized under the Act, by diluting the cachet of medals, steal a small piece of the reputational value to which each true medal winner could otherwise lay claim. This, as has been argued in a previous section, is highly contestable. But even granting it to be true, *arguendo*, strict lines have been drawn around claims of harms – even direct harms – to the reputation of groups.

A defamatory statement that ran to a broad group of individuals did not traditionally give rise to

a claim for each individual. *See, e.g.*, *King v. Alme & Nott*, 91 Eng. Rep. 790, 790 (K.B. 1701) ("Where a writing which inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel, but it must descend to particulars and individuals to make it a libel."). Rather, the law of defamation evolved such that the only people who could state a claim would be those who could show some "special application" of the defamatory matter to himself. Joseph Tanenhaus, *Group Libel*, 35 Cornell L.Q. 261, 263 (1950). Indeed, this fits with defamation's historical purpose: if a defamation suit is an alternative to dueling, the claim should only run to statements pointed enough than an individual would take up the sword to protect his personal honor.

The government's dilution theory is even a step further afield from group libel, as it depends not on the direct harm of a scurrilous claim against a large group, but on the indirect harm of dilution of a group's members' accumulated goodwill. The more diffuse and indirect the harm, however, the more likely it is that the harms caused by speech can and will be adequately addressed by counter-speech. *See* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1116-17 (2006).

It is not arbitrary that defamation and fraud have been so long prohibited; they reflect society's interest in preventing tangible harms to specific individuals. But the "First Amendment precludes

punishment for generalized 'public' frauds, deceptions, and defamation." Fried, *supra*, at 238. Thus even if the Court does not draw the line at those areas that have been deemed historically unprotected, it should hesitate before accepting the government's attempt to prove a harm that is so drastically different from those that ground the *Chaplinsky* test.

3. Even if the government's test applied, it has not demonstrated the need for this law.

For the same reasons the Act fails strict scrutiny, it fails the government's proposed test as well. *See supra* pp. 17-28. The government's interests here are legitimate, but not important or strong. The government has not shown that false claims actually impede the government's ability to foster morale. Moreover, the law includes within its scope fully protected speech such as parody and satire, *see supra* pp. 29-31, and fails to include any requirement of harm. It therefore does not leave sufficient breathing space for speech. And, contrary to the government's position, Gov't Br. 49-50, this law *does* go farther than necessary, in that the government's interests can be sufficiently protected by having an easily accessible means to root out false claims and by numerous other steps the government could take to protect the reputation of military medals. *See supra* pp. 19-27.

The government maintains that the Act is not directed at "any particular message about a

government symbol." Gov't Br. 45. But, of course, the Stolen Valor Act *does* impose a certain viewpoint: that military awards are sacrosanct, that they are too important to be the subject of tall tales, and that military heroes should not have to suffer the same foolishness to which others are subjected. In this, the Act shares more in common with the flag-burning statutes than the government admits: both attempt to take a symbol that most view with respect and reverence, and put it beyond the normal rules of speech. The flag burner shows his disdain through protest; the military award claimant shows his disrespect through treating a military honor as no different from an exaggeration he might tell about his weight – or, say, having played professional hockey. But both should lay claim to the same protection: "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Johnson*, 491 U.S. at 417-20. As with flags, "[t]he way to preserve the [medal's] special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Id.* at 419.[17]

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[17] This suggests that the Court could decide this case on a narrow basis: that is, even if the category of false statements receives lesser or no First Amendment protection, the government cannot choose to legislate even unprotected areas of speech based on hostility towards the underlying message. *R.A.V.*, 505 U.S. at 386. Congress criminalized lies about military honors, not false claims about the presidential medal of freedom (for

III. THE LAW IS OVERBROAD AS APPLIED TO XAVIER ALVAREZ, A POLITICAL OFFICEHOLDER.

Apart from its facial invalidity, the Stolen Valor Act is also unconstitutional as applied to Alvarez because he was an elected official at a public meeting describing his background and his qualifications for office. Government intrusion into speech made by politicians is particularly suspect. Discussions of qualifications of political candidates are considered core political speech to which the highest scrutiny is afforded. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). The government argues that Alvarez "was free to express . . . his qualifications for office in any way he wished," just not by

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contributions to, inter alia, national interest or security) or the medal of valor (for acts of bravery by law enforcement). It did not criminalize lies about government employment, military service, or any other lies one can tell about oneself. As in *R.A.V.*, it claimed to do so based on particular harms, but the clear motivation was that those lies are particularly offensive both to award winners and to the public at large. And, as in *R.A.V.*, the end was honorable but the means were unconstitutional. The court of appeals suggested that the Stolen Valor Act might fall into the third *R.A.V.* exception, the exception for cases where "there is no realistic possibility that suppression of ideas is afoot." Pet. App. 12a. The court emphasized the word *ideas*, and believed that, because the Act curtailed only purported statements of facts, no viewpoint discrimination was afoot. Respondent believes that the key word from *R.A.V.*'s exception is not ideas, but *suppression*, and that improperly motivated government suppression can be found just as often in suppression of facts as in suppression of ideas. Moreover, as discussed, the Act *does* involve a certain viewpoint discrimination.

"misrepresent[ing] that he had been awarded the Nation's highest military honor." Gov't Br. 53. But the government cannot have it both ways. Plainly, a politician detailing his qualifications for office – even a false statement about those qualifications – is political speech.

The breadth of protection afforded political speech under the First Amendment is difficult to overstate in light of this Court's recent precedents. For example, in *Citizens United*, this Court explained that "political speech must prevail against laws that would suppress it, whether by design or inadvertence." 130 S. Ct. at 898. Although the Court concluded that the application of strict scrutiny was sufficient to protect the speech in that case, the Court went so far as to suggest that "it might be maintained that political speech simply cannot be banned or restricted as a categorical matter." *Id.* Accordingly, even were this Court to conclude that the law was not facially unconstitutional, the Act is unconstitutional as applied to Mr. Alvarez.

* * *

Criminalizing the telling of a lie about oneself – even a lie which might tend to tarnish the reputation of a military honor – is simply beyond the limited exceptions to the constitutional dictate that "Congress shall make no law . . . abridging the freedom of speech." It is especially so where, as here, the lie harmed no one, and no benefit was sought or received. The Stolen Valor Act is a content-based

restriction of speech that fails strict scrutiny review. As such, it is facially unconstitutional under the Free Speech Clause of the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 11-210

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Stolen Valor Act, 18 U.S.C. 704(b), is the latest in a century-long line of congressional efforts to safeguard the vital functions of the military honors program. In Section 704(b) Congress prohibited a narrow category of knowing misrepresentations that, in the aggregate, threaten to dilute the honors' effectiveness in conferring prestige upon true recipients and fostering morale within the military. Because Section 704(b) prohibits only knowingly false, harmful factual statements, serves a compelling government interest, and does not chill any protected speech, it is constitutional.

Respondent does not contend that Section 704(b), properly construed to prohibit knowing factual misrepresentations, prohibits or chills any truthful statements, expressions of opinions and beliefs, or any other fully protected speech. Rather, respondent argues that upholding Section 704(b) would necessarily mean that the government may

prohibit a wide range of speech that is wholly unlike the verifiable, harmful knowing misrepresentations prohibited by Section 704(b)—including statements that respondent characterizes as "false" but that are actually ideas, opinions, and other unverifiable assertions. Respondent's concerns are unfounded. Upholding Section 704(b) would not suggest that the government could arbitrate truth, punish criticism under the guise of restricting "falsehoods," or prohibit everyday lies. Section 704(b)'s narrow prohibition falls squarely within the Court's decisions holding that knowing falsehoods have no intrinsic constitutional value. And the compelling interest that Section 704(b) serves is supported by a long tradition of statutory prohibitions on knowing misrepresentations that threaten the integrity of government programs.

I. RESTRICTIONS ON KNOWINGLY FALSE FACTUAL STATEMENTS ARE CONSTITUTIONAL IF THEY SERVE AN IMPORTANT GOVERNMENT INTEREST AND PROVIDE ADEQUATE BREATHING SPACE TO FULLY PROTECTED SPEECH

Over the past 50 years, the Court has developed a unified approach to knowingly false statements of fact. That analysis begins with two critical premises: "false statements are not immunized by the First Amendment * * * for their own sake" but the Amendment "requires that we protect some false speech in order to protect *speech that matters*." *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 530-531 (2002) (internal quotation marks omitted). That approach permits restrictions that serve an important government interest and provide breathing space for protected speech. Respondent argues that the Court's false-statement cases all involve variants of defamation and other historically unprotected categories of speech, but that view

cannot be squared with the Court's own reasoning. Nor is respondent correct that the breathing-space analysis conflicts with the principle that the First Amendment does not recognize a "test of truth." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964). The Court has applied that principle to "ideas and beliefs," *ibid.* (citation omitted), while permitting appropriately tailored restrictions on verifiably false, knowing statements of fact. The breathing-space analysis thus ensures that restrictions on false factual statements do not punish ideas, beliefs, or viewpoints, or cause an undue chilling effect.

A. The Court Has Consistently Applied The Breathing-Space Analysis To Restrictions On False Factual Statements

1. a. In every context in which the Court has evaluated false-statement restrictions, it has reasoned from the premise that knowingly false statements are entitled only to limited derivative First Amendment protection. See, *e.g.*, *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) ("[c]alculated falsehood" is "no essential part of any exposition of ideas") (citing *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)); see also *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003); *BE&K*, 536 U.S. at 531; *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 52 (1988) (*Hustler*); *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 743-744 (1983) (*Bill Johnson's*); *Brown* v. *Hartlage*, 456 U.S. 45, 60-61 (1982); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340–341 (1974); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967).

Respondent attempts to minimize these repeated assertions as nothing more than "passing statements" (Br. 36-37) that bear no weight in the Court's decisions. In respon-

dent's view, the Court has applied the breathing-space analysis only to restrictions on defamation and fraud—categories that historically have been treated as completely unprotected. Br. 46-52. But although the Court first developed the approach to explain why it was applying First Amendment limitations to defamation law, see *New York Times*, 376 U.S. at 272, it soon extended the approach to permit restrictions on other categories of knowingly false statements—namely, false-light invasion of privacy, intentional infliction of emotional distress, false campaign promises, and baseless lawsuits. In each case, the Court began with the proposition that "calculated falsehood," *Hill*, 385 U.S. at 389, is entitled only to limited First Amendment protection.

In *Hartlage*, for instance, the Court applied the approach to a state statute that had been construed to prohibit candidates from promising to lower their salaries when doing so was against state law. 456 U.S. at 49-50 & nn. 5-6. Although respondent argues that *Hartlage* concerned the unprotected category of "speech integral to illegal conduct," Br. 51, the Court *rejected* the contention that the statements could be characterized as "solicitation[] historically recognized as unprotected by the First Amendment." 456 U.S. at 57. Having so concluded, the Court then considered whether the statute could be upheld as a false-statement regulation, as "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements," *id.* at 60 (citing *Gertz*, 418 U.S. at 340). The Court held that although "State[s] ha[ve] a legitimate interest in upholding the integrity of their electoral processes," *id.* at 52, the statute did "not afford[] the requisite 'breathing space'" to protected speech because it lacked a scienter requirement, *id.* at 60-61.

The Court similarly extended the breathing-space approach to false-light invasion of privacy in *Hill* on the ground that "calculated falsehood enjoy[s] no immunity in the case of alleged defamation" and "[s]imilarly, calculated falsehood should enjoy no immunity in the situation here presented us." 385 U.S. at 389-390. Despite the Court's reliance on the lack of protection accorded to "calculated falsehood," *ibid.*, respondent argues that false-light actions should be viewed as sharing "defamation's historical pedigree" because some States have since concluded that the two torts overlap. Br. 50. But the Court itself did not share respondent's view, as it emphasized that unlike defamation, the false-light tort did *not* have a long historical pedigree. *Hill*, 385 U.S. at 383 n.7. And the two torts protect different interests: while false-light actions address the "mental distress from having been exposed to public view" from nondefamatory false statements, in "libel cases * * * the primary harm being compensated is damage to reputation," *id.* at 385 n.9; see *Gertz*, 418 U.S. at 335 n.6 ("nondefamatory factual errors" at issue in false-light are a "'discrete context'") (quoting *Hill*, 383 U.S. at 390-391).

Similarly, in holding that intentional infliction of emotional distress actions may be based on knowingly false statements, the Court stated that the tort sought to prevent "severe emotional distress" rather than "reputational damage." *Hustler*, 485 U.S. at 52-53. Indeed, many knowingly false statements that cause distress may not be defamatory, such as falsely stating that someone's child has died. Respondent's argument that this tort is "more similar to defamation than different" (Br. 49) obscures the Court's expansion of breathing-space analysis to new types of false-statement actions.

Finally, in explaining why baseless lawsuits may be prohibited consistently with the First Amendment, the Court

analogized to false statements: baseless lawsuits are unprotected "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech." *Bill Johnson's*, 461 U.S. at 743. Drawing on *Gertz*, the Court explained that its imposition of additional requirements, including scienter, before such suits could be the basis for liability, was "consistent with these 'breathing space' principles." *BE&K*, 536 U.S. at 531. These decisions reaffirm the Court's general approach to false factual statements—they are entitled to breathing-space protection—and its willingness to apply that reasoning to new types of false factual statements.

b. The breathing-space analysis developed in these decisions does not, as respondent suggests (Br. 53), permit restrictions on "falsity in the air," without more—if that were so, then all knowing falsehoods would be entirely unprotected. Rather, the Court has in each case emphasized that the restriction was justified by the government's interest in preventing the *particular harm caused* by the misrepresentations at issue. See, *e.g.*, *Gertz*, 418 U.S. at 341; see also *Hustler*, 485 U.S. at 53. That interest must be sufficiently important to justify any chilling effect on protected speech that might realistically result from the restriction. See *Gertz*, 418 U.S. at 341. And the restriction must minimize any chill by including elements such as scienter and, if the restriction does chill any protected speech, by extending no further than necessary. Gov't Br. 28.

Nor would it be correct (see Resp. Br. 23-24) to suggest that "counter-speech" in the form of "public refutation of false claims" is generally "adequate[] [to] protect the government's interest." Perjury, fraud, and defamation statutes all attest to the existence of harms from false speech that cannot be remedied in the marketplace for speech and ideas. For example, the Court has recognized in the defa-

mation context that "an opportunity for rebuttal seldom suffices to undo [the] harm"; while the efficacy of counterspeech can be relevant to the strength of the government's interest, it alone "is inadequate" to obviate the need for defamation actions. *Gertz*, 418 U.S. at 344 n.9.

2. The Court's consistent application of the breathing-space approach to false factual statements that do not fall into any category of historically unprotected speech refutes respondent's suggestion that the government is "attempt[ing] to sidestep" *United States* v. *Stevens*, 130 S. Ct. 1577 (2010). Br. 35. Unlike the novel categories of entirely unprotected speech proposed in *Stevens*, 130 S. Ct. at 1584, and *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011), false factual statements have long been subject to restriction under this Court's decisions because they have long been understood to lack intrinsic value. *Stevens* had no occasion to address this distinct category of speech, which is accorded *limited* protection, because *Stevens* concerned whether to declare a new category of *unprotected* speech. And while *Stevens*'s references to defamation and fraud reflected those categories' roots as historically unprotected, the Court has conceived of those categories as specific types of knowing misrepresentations, applied a limited degree of strategic protection, and extended that approach to other false statements. See *New York Times*, 376 U.S. at 269; Gov't Br. 21-27. *Stevens* did not silently overrule the Court's numerous false-statement decisions applying that limited form of protection.

Respondent's argument (Br. 12-16) that *Stevens* mandates strict scrutiny for all false-statement prohibitions (outside of the historically unprotected categories) is particularly misplaced in view of Congress's longstanding prohibition of a range of false statements that do not constitute fraud, defamation, or solicitation and cannot possibly be

characterized as sharing their historical pedigree. Gov't Br. 29-33; see, *e.g.*, 18 U.S.C. 1001 (enacted in 1918); 18 U.S.C. 1015, 1027. The Court has never suggested that these statutes raise First Amendment concerns, let alone require strict scrutiny. See, *e.g.*, *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941). Respondent dismisses (Br. 52) these numerous statutes because they have not been subject to First Amendment challenge in this Court—but that fact simply underscores the universal understanding that the government may prohibit factual misrepresentations that are harmful but not fraudulent.

B. Restricting Knowingly False Factual Statements Is Consistent With Protecting Ideas, Beliefs, And Viewpoints

Respondent next contends that false-statement restrictions must be subject to strict scrutiny because there are "myriad reasons why false statements are valuable." Br. 37. In so arguing, respondent conflates the narrow category of knowingly false, harmful factual representations that may be restricted under this Court's precedents—and that are at issue in this case, see pp. 14-20, *infra*—and expressions of opinions, beliefs, and ideas. But it is the "common premise" of the Court's decisions "that while the Constitution requires that false ideas be corrected only by the competitive impact of other ideas, the First Amendment affords no constitutional protection for false statements of fact." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 499 n.3 (1975) (Powell, J., concurring).

1. Respondent contends that applying anything less than strict scrutiny would "significantly undervalue[] false speech," because such speech contributes to public debate and promotes personal autonomy. Br. 36-44. But what respondent describes as "false speech" in making this argument does not consist of false factual statements at all, but

rather, expressions of ideas, opinions, or beliefs. See Br. 36-39, 43-45 (citing, *e.g.*, John Stuart Mill, *On Liberty*, in 18 *The Collected Works of John Stuart Mill* 213, 229-235 (John M. Robson ed. 1977) (1859); Thomas Cooper, *A Treatise on the Law of Libel and the Liberty of the Press; Showing the Origin, Use and Abuse of the Law of Libel* 54 (New York, G.F. Hopkins & Son 1830); *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-504 (1984); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 Calif. L. Rev. 1159, 1164-1165 (1982); *Cohen* v. *California*, 403 U.S. 15, 21-25 (1971)).

To be sure, the government may not declare an idea, belief, or viewpoint to be "false" and sanctionable simply because the government—or a majority of the population—believes that idea to be valueless. See, *e.g.*, *New York Times*, 376 U.S. at 271 ("constitutional protection does not turn upon the truth, popularity, or social utility of the *ideas* and *beliefs* which are offered") (emphasis added; internal quotation marks omitted); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). Nor may the government attempt to arbitrate "truth" by permitting juries to decide whether unverifiable assertions or arguments are false. *Milkovich*, 497 U.S. at 19-20. And as a corollary to these principles, the government may never place the burden of demonstrating truth on the speaker, as that would unacceptably chill criticism of government and expression of unpopular viewpoints. *New York Times*, 376 U.S. at 279.

But as *New York Times* itself demonstrates, these principles are entirely consistent with restrictions on objectively verifiable, knowingly false claims of fact like those at issue in this case. Such statements, even those made in the context of criticizing public officials on matters of public concern, may constitutionally be restricted. 376 U.S. at

279-280. That is because verifiably false statements of fact are distinguishable from opinions and ideas, lack intrinsic constitutional value, and can cause harms that the government has a legitimate interest in preventing, even when the statements consist of criticism of government officials or their conduct. *Gertz*, 418 U.S. at 341-342; *New York Times*, 376 U.S. at 283. The Court's requirement of "breathing space" limitations on false-statement prohibitions ensures that such restrictions affect only verifiably false factual statements and are not used to label expressions of opinion, viewpoints, or beliefs as "falsehoods." See *Milkovich*, 497 U.S. at 19-21 (breathing-space protections ensure that statements "which do[] not contain a provably false factual connotation will receive full constitutional protection").

2. For similar reasons, respondent's contention (Br. 41-44) that upholding Section 704(b) would suggest that the government could prohibit a wide range of purportedly false speech—including assertions about scientific and historical facts, political opponents, and one's state of mind—is unfounded. Those statements bear no resemblance to the narrow category of verifiably false claims at issue in this case.

For example, respondent argues (Br. 43) that the government could prohibit false claims of historical or scientific "facts," but what respondent labels "facts" are more aptly characterized as propositions that experts in the field would accept as truth. Restrictions on these claims would be invalid as improper attempts to prohibit statements of belief. While certain aspects of science and history are today viewed as beyond reasonable debate, as a class, the body of scientific and historical knowledge is not purely "factual," but instead represents the prevailing consensus. "False" claims may simply challenge the majority view. To permit juries to determine the "truth" of these claims would im-

properly make the government the arbiter of historical or scientific truth, chilling expressions of belief and hindering the evolution of thought and scholarly inquiry. And because demonstrably false claims like Holocaust denial are generally inseparably intertwined with ideological or political viewpoints, attempts to prohibit them would likely be viewpoint discrimination. See *R.A.V.*, 505 U.S. at 388.

Similarly, restrictions on political campaign statements, such as false claims about a political opponent's positions or the substance of a ballot initiative (Resp. Br. 42), will almost invariably be struck down because they target statements that raise matters of interpretation and argument rather than demonstrable falsehoods. Such laws may also create an intolerable chilling effect on political speech because the government and juries are not "capable of correctly and consistently negotiating the thin line between fact and opinion in political speech." *Rickert* v. *State Pub. Disclosure Comm'n*, 168 P.3d 826, 842 (Wash. 2007). The chilling effect arising from such restrictions may be particularly unjustifiable in light of the reality that political false-statement prohibitions would almost certainly extend further than necessary to achieve a legitimate aim, see *Gertz*, 418 U.S. at 349, because in the campaign context, a "candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent," *Hartlage*, 456 U.S. 61.

Finally, upholding Section 704(b) would not suggest that the government may regulate what respondent describes as "socially useful" lies that everyone tells (Resp. Br. 40). Most of respondent's examples—representations about one's state of mind (such as assuring someone that his outfit is flattering, Br. 40), self-characterizations, Br. 41, and portrayals of "different personae," Br. 39—are unverifiable assertions that are no more susceptible to being labeled

"false" than opinions or beliefs. And it is extremely unlikely that the government would be able to demonstrate an important interest in restricting misrepresentations about one's intimate or everyday conduct, since, as respondent argues (Br. 42), such lies have long been ubiquitous and may often have offsetting social benefits. Such restrictions also would often not provide adequate breathing space for protected speech. The fear of the government intrusions into one's private life that enforcing many such restrictions would entail might in many cases significantly chill fully protected, non-false speech, as people attempt to avoid entirely the topics covered by the restriction.

II. SECTION 704(B) IS A VALID RESTRICTION ON KNOWINGLY FALSE REPRESENTATIONS THAT HARM A COMPELLING GOVERNMENT INTEREST

Under the breathing-space analysis, Section 704(b) is constitutional. The government has a strong—indeed, compelling—interest in protecting the integrity of its military honors system against knowingly false claims, and the narrow prohibition poses no risk of chilling any protected speech. See *United States* v. *Strandlof*, No. 10-1358, 2012 WL 247995, at *16-*18 (10th Cir. Jan. 27, 2012) (upholding Section 704(b)).

A. The Government Has A Compelling Interest In Protecting The Integrity Of The Military Honors System

1. As the court of appeals concluded, the government has a compelling interest "in preserving the integrity of its system of honoring our military men and women." Pet. App. 37a. That system serves the vital purposes of conveying to the public the government's gratitude towards those who have sacrificed for the country and fostering morale and valorous conduct within the military. Respondent, relying solely on the since-reversed district-court decision in

United States v. *Strandlof*, 746 F. Supp. 2d 1183, 1190-1191 (D. Colo. 2010), rev'd, No. 10-1358, *supra*, expresses skepticism about these purposes. Br. 18. But the historical understanding of military honors refutes that skepticism. In 1782, when General Washington announced the first medals, he stressed that they would confer public honor on their recipients and also "cherish a virtuous ambition" in soldiers. *General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783*, at 35 (Edward C. Boynton ed., 1883; reprint 1909). In 1861, when Congress created the modern Medal of Honor, it did so to encourage valorous acts. Cong. Globe, 37th Cong., 2d Sess. 72. Today, the armed services continue to view these purposes as animating the honors system. Gov't Br. 5-6.

Respondent next argues (Br. 19) that false claims to have received a military honor do not damage the public's opinion of the awards themselves or "stain the[] honor" of true recipients. But Section 704(b) aims to prevent harm to the functioning of the government's military honors system, not harm to medal recipients' reputation or honor. The government employs military honors to convey a message to the public that the recipient has been endorsed by the government as part of a select group. S. Comm. on Veterans' Affairs, *Medal of Honor Recipients 1861-1973*, at 2-4 (Comm. Print 1973) (*Medal of Honor Report*); Gov't Br. 37-39. The aggregate effect of false claims undermines that purpose, not by harming public opinion of the awards or true recipients, but by diluting the medals' message of prestige and honor. By creating the misimpression that the claimant has received a medal for fictitious conduct that likely bears no relation to the government's standards for awarding each medal, false claims undermine the government's efforts to maintain selectivity and to convey information about recipients' conduct. And because misappro-

priation may make the public skeptical of *all* claims, allowing false claims to go unchecked could cause actual recipients to face unjustified doubts and harmful consequences if their records are not readily discoverable through private research. See Office of the Under Sec'y of Defense, Personnel and Readiness, *Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database* 4 (2009) (*Decorations Database*).

Respondent also argues (Br. 19-20) that false claims do not undermine the awards program's ability to foster morale within the military because the armed services provide numerous benefits to actual recipients. But the benefits given to actual recipients do not prevent or even address the harm caused by false claims. In order to ensure that singling out particular individuals for commendation is inspiring rather than divisive, the military's criteria for awarding medals must be perceived as transparent and fair. High-profile misrepresentations may create doubts among service members about those standards. Public skepticism may also make military awards less effective in promoting morale. See *Examination of Criteria for Awards and Decorations: Hearing Before the Military Pers. Subcomm. of the H. Comm. on Armed Services*, 109th Cong., 2d Sess. 22 (2006) (statement of Lt. Gen. Michael D. Rochelle, Deputy Chief of Staff, G-1, U.S. Army).

Finally, respondent contends (Br. 18-19) that these rationales are "newly proffered" and unsupported by congressional findings. To the contrary, Congress found that "[f]raudulent claims * * * damage the reputation and meaning of such decorations and medals." Stolen Valor Act, § 2, 120 Stat. 3266. That conclusion draws on Congress's century-old understanding that the awards' ability to serve their intended purposes is harmed by "confusion as

to who earned and who did not earn" particular medals and by dilution of the select group of recipients. *Medal of Honor Report* 4. Congress has repeatedly enacted protections for military awards based on this understanding and the armed services' concurrence in it. In 1916, for instance, concerned that too many Medals of Honor had been awarded using unduly lax standards, Congress provided for the rescission of wrongly awarded medals—and made it a crime to dilute the government's message of endorsement by continuing to wear a rescinded medal. *Id.* at 9-10; Act of June 3, 1916, Pub. L. No. 64-85, § 122, 39 Stat. 166, 214. In 1923, at the urging of the Secretary of War, Congress made it an offense for anyone to wear a medal without authorization, on the ground that "[i]f the decorations of honor * * * awarded by the War Department are to continue to serve the high purpose for which they are intended," they should be protected against dilution. H.R. Rep. No. 1484, 67th Cong., 4th Sess. 1-2 (1923). Thus, Congress and the armed services have long understood that dilution and misappropriation undermine the program's ability to achieve its intended purposes, and Congress has legislated to prevent that harm. Section 704(b) is simply the latest such effort.[1]

2. Respondent contends (Br. 54-57) that the interests furthered by Section 704(b) are not legitimate because the government may not restrict false statements of fact except upon a showing of individualized harm in specific cases. But Congress may conclude that certain statements are presumptively harmful and that a showing of harm in individual cases is unnecessary. Such a conclusion does not automatically prevent a restriction from serving an impor-

[1] The history of medals legislation also conclusively refutes respondent's speculation (Br. 21) that the "true" purpose of the statute is to "avoid the offense that is experienced by real medal winners."

tant interest or being adequately tailored for First Amendment purposes. See, *e.g.*, *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 535-540 (1987). Indeed, numerous statutes prohibit false statements without requiring a showing of case-specific harm. See, *e.g.*, 18 U.S.C. 1001; 18 U.S.C. 1014; Gov't Br. 29-30. Here, Congress's conclusion that all false claims are harmful because of their aggregate effect of undermining the medals program does not render the government's interest any less compelling or cause Section 704(b) to chill any protected speech. See pp. 17-20, *infra*.

Nor is respondent correct that the government may not restrict knowingly false statements without showing that the statements caused harm to individuals, as opposed to government programs. If that were true, the government would be powerless to safeguard regulatory operations from misrepresentations. Innumerable false-statement statutes are premised on harm to regulatory or law-enforcement functions, 18 U.S.C. 1001; *Gilliland*, 312 U.S. at 93; Gov't Br. 30 & n.6 (citing statutes), or harm to a tribunal's administration of its proceedings, 18 U.S.C. 1623 (perjury); *Brogan* v. *United States*, 522 U.S. 398, 402 & n.1 (1998). And Congress has prohibited various false claims of federal endorsement because they presumptively interfere with the government's ability to function. See, *e.g.*, 18 U.S.C. 912; *United States* v. *Barnow*, 239 U.S. 74, 76-77 (1915); *United Seniors Ass'n, Inc.* v. *SSA*, 423 F.3d 397, 407 (2005), cert. denied, 547 U.S. 1162 (2006). Section 704(b) is of a piece with these statutes: Congress has concluded that a false representation to have the government's endorsement in the form of a military honor threatens the awards program's ability to serve its purposes.

3. Respondent also argues (Br. 57-58) that Section 704(b)'s true purpose is, like the flag-burning prohibition

invalidated in *Texas* v. *Johnson*, 491 U.S. 397 (1989), to suppress criticism of government by enforcing the viewpoint that military awards are "too important" to be disrespected. That argument is meritless. The restriction at issue in *Johnson* prohibited a form of symbolic speech that tended to denigrate or criticize a government symbol. Section 704(b) does something entirely different. It narrowly prohibits misrepresentations of government endorsement.[2] Its purpose is not to impose any particular view of the medals themselves but rather to prevent dilution-based harms that interfere with the awards program's ability to serve its purposes. A person who wants to express the viewpoint that "military awards are [not] sacrosanct," Resp. Br. 58, or that they do not actually symbolize honor and valor, is free to do so directly. See *San Francisco Arts*, 483 U.S. at 536 & n.14.

B. Section 704(b) Does Not Chill Any Protected Speech

1. The narrow and discrete nature of the knowingly false representations prohibited by Section 704(b) provides a unique degree of assurance that the provision chills no fully protected speech. Unlike many of the hypothetical restrictions on "false speech" that respondent canvasses (Br. 28-32), see pp. 8-12, *supra*, Section 704(b) ensures that the government may prosecute someone only when the falsity of the representation is objectively verifiable, such as through extant military records; otherwise, the government will be unable to prove falsity beyond a reasonable doubt.[3] A person is unlikely to be uncertain or mistaken

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[2] For this reason, amicus's analogy to the Sedition Act of 1798, ch. 74, 1 Stat. 596, is misplaced. Reporters Comm. for Freedom of the Press et al. Amicus Br. 7-10.

[3] Because this limitation is intrinsic to the statute, respondent's assertion (Br. 22 n.4) that the government is relying on "noblesse

about whether he has received a medal, and in any event, the statute's knowledge requirement protects mistaken statements. And again unlike respondent's hypotheticals, Section 704(b) operates only on misrepresentations that are not intertwined with any particular viewpoint. The line between a knowingly false award-related claim and all other expressions of facts, ideas, or opinions is well-defined and objective. Section 704(b) could not be used to impose orthodoxy or punish criticism, and it creates no risk that people will refrain from truthful speech about any topic for fear of prosecution. *New York Times*, 376 U.S. at 279; *R.A.V.*, 505 U.S. at 388; cf. *Meyer* v. *Grant*, 486 U.S. 414, 419 (1988).

2. Respondent does not claim that Section 704(b), properly construed to prohibit only knowing misrepresentations of fact, chills any protected speech. Instead, respondent attempts to generate the potential for chilling effect by distorting the meaning of the statute. Although respondent rightly acknowledges that Section 704(b) is best read to require knowledge of falsity, he erroneously contends that Section 704(b) prohibits not only statements that reasonably can be understood as factual claims, but also hyperbole and satire. Br. 29-31.

That strained interpretation should be rejected. Section 704(b) prohibits "falsely represent[ing]" oneself to have received a medal. The term "represent" means to "place *(a fact)* clearly before another." 13 *Oxford English Dictionary* 657 (2d ed. 1989) (emphasis added) (*OED*); *id.* at 659 ("representation" (definition 4.a) is "[t]he action of placing a fact, etc., before another").[4] *Black's Law Dictionary* rein-

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oblige" to narrow the statute is misplaced.

[4] Contrary to respondent's argument (Br. 29-30), the second edition of the *OED*, which was current when Section 704(b) was enacted,

forces the point, defining "representation" as a "presentation of fact." *Black's Law Dictionary* 1415 (9th ed. 2009) (*Black's*). And the use of the adverb "falsely" to modify "represent[]" removes any doubt. The *OED* defines a "false representation" as a "misrepresentation[] made to convey a false impression" and indicates that the phrase uses the form of "representation" that connotes conveying a fact—not the artistic and symbolic senses of the word on which respondent relies (Br. 29-30).[5] 5 *OED* 698 ("false" definition 8.b and usage examples); *Black's* 1091, 1415 ("misrepresentation" is a "false assertion of fact") (quoting Restatement (Second) of Contracts § 159, comment. (a) (1979)).

Respondent's construction is also not reconcilable with Congress's stated purpose of preventing "[f]raudulent claims surrounding the receipt" of military medals. See Stolen Valor Act § 2(1), 120 Stat. 3266. Respondent suggests no reason to conclude that despite this focus, Congress would have extended Section 704(b) to statements that reasonable observers would not interpret as claims of fact. See *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993). And if there were any doubt about the statute's scope—there is not—the provision should be construed to

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remains the current complete edition. A similar definition of "represent" appears in the uncompleted third edition. See *OED* (3d ed. Dec. 2009) (definition 12.b-d and usage examples); online version Dec. 2011, http://www.oed.com/view/Entry/162991.

[5] Congress has repeatedly used the phrase "falsely represents" in contexts that similarly leave no doubt that Congress did not intend to capture satire. See, *e.g.*, 12 U.S.C. 2277a-14(a)(2)(A) (prohibiting "falsely represent[ing]" oneself as insured); 8 U.S.C. 1227(a)(3)(D) ("Any alien who falsely represents * * * himself to be a citizen is deportable"); 18 U.S.C. 499 (prohibiting "falsely represent[ing]" oneself as having a military permit).

avoid the First Amendment concerns that prohibiting satire would raise.[6] See *Watts* v. *United States*, 394 U.S. 705, 705, 708 (1969) (per curiam).

C. Section 704(b) Extends No Further Than Necessary

Because Section 704(b) furthers a strong government interest and does not deter any protected speech, it provides adequate breathing space and should be upheld. Even assuming that Section 704(b) did chill some speech, however, the provision is constitutional because any chill would be minimal and no greater than necessary to further the government's interest. *Gertz*, 418 U.S. at 349.

Respondent contends (Br. 22-28) that Section 704(b) is unnecessary because private individuals may effectively detect and reveal false claims. But the prevalence of false claims that concerned Congress in 2005, Gov't Br. 44, demonstrates that private refutation had been ineffective in deterring such claims, much less remedying their aggregate dilutive effect. Stolen Valor Act § 2(3), 120 Stat. 3266. Moreover, many misrepresentations elude private detection. Even assuming that a significant proportion of observers would be motivated to attempt to verify such claims, public records are often insufficient or not readily available. See Am. Legion Amicus Br. 18-19. Although the Department of Defense at Congress's request evaluated the feasibility of creating a public database, the Department concluded that compiling a sufficiently complete database was impracticable and that an incomplete database could

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[6] Respondent's suggestion (Br. 31 & n.9) that even "if satire is excepted" people might be chilled from engaging in it is inconsistent with this Court's recognition that limiting a restriction to statements that "reasonably [can be] interpreted as stating actual facts" provides adequate breathing space for satire. *Milkovich*, 497 U.S. at 17 (quoting *Hustler*, 485 U.S. at 50).

inadvertently cast doubt on legitimate recipients. *Decorations Database* 4-8. In attempting to undermine that conclusion, respondent relies exclusively (Br. 25-27) on a private citizen's counter-report, but that speculative criticism of the Department's analysis of its own records and the feasibility of creating a database is unpersuasive.

Respondent's remaining arguments boil down to the assertion (Br. 23) that the government could use existing fraud statutes to capture some who lie about receiving medals. Respondent's own conduct, however, demonstrates that fraud statutes will not capture many of the misrepresentations with which Congress was concerned. Prosecuting only those false claimants who happen to commit other frauds—and therefore could be prosecuted whether or not they made false claims about military awards—would not address the aggregate dilutive effect of false claims.[7]

D. Section 704(b) Also Can Be Upheld Under Strict Scrutiny

For the same reasons, Section 704(b) would survive strict scrutiny. The government has a compelling interest in protecting the integrity of its military award system against knowingly false claims that dilute the meaning of the awards, and Section 704(b) is the least restrictive means necessary to protect the government's compelling interest. *Burson* v. *Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion). Respondent contends that, viewed through the

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[7] Respondent argues in passing (Br. 59-61) that Section 704(b)'s application to him is unconstitutional because his misrepresentations were "political speech." But even assuming that respondent's speech was political—it was not, see Gov't Br. 52-54—Section 704(b) is distinct from generalized prohibitions on false statements about candidates or positions, see *Rickert*, *supra*, because its narrowly targeted prohibition on a specific verifiable misrepresentation does not raise concerns about the government acting as an arbiter of truth, discriminating based on viewpoint, or chilling truthful speech in *any* context.

lens of strict scrutiny, Congress did not muster adequate evidence that false claims harm the awards program and that Section 704(b) is necessary. But Congress was entitled to rely on its hundred-year history of restricting misappropriation based on its understanding that doing so was necessary to protect the honors' ability to serve their purposes; the armed services' concurrence, beginning with General Washington's command, in the need for such restrictions; and Congress's conclusion that existing protections were insufficient to address the problem of verbal misrepresentations. See *id.* at 206.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2012

AMICUS CURIAE BRIEF

No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner,

—v.—

XAVIER ALVAREZ, Respondent..

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, ASSOCIATION OF AMERICAN PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND, ENTERTAINMENT MERCHANTS ASSOCIATION, FREEDOM TO READ FOUNDATION, PEN AMERICAN CENTER, VILLAGE VOICE MEDIA HOLDINGS, LLC, AND WRITERS GUILD OF AMERICA, WEST, INC. AS *AMICI CURIÆ* IN SUPPORT OF RESPONDENT

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American Booksellers Foundation For Free Expression, American Federation of Television and Radio Artists, Association Of American Publishers, Inc., Comic Book Legal Defense Fund, Entertainment Merchants Association, Freedom to Read Foundation, PEN American Center, Village Voice Media Holdings, LLC, and Writers Guild of America, West, Inc., respectfully submit this brief as *amici curiæ* in support of Respondent.[1]

INTEREST OF *AMICI*

Amici's members (also referred to herein as "*Amici*") write, create, publish, produce, distribute, sell, advertise in, and manufacture books, magazines, videos, sound recordings, motion pictures, interactive games, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.[2] Libraries and librarians whose interests are represented by *Amicus* Freedom to Read Foundation (FTRF) provide such materials to readers and viewers, whose First Amendment rights FTRF also

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiæ*, their members, their counsel, or Media Coalition Inc. (a 38-year old trade association of which some of the *amici* are members) made a monetary contribution to its preparation or submission.

The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

[2] A description of each of *Amici* is attached as Appendix A.

defends.

Amici have a significant interest in preventing the imposition of unconstitutional governmental limitations on the content of their First Amendment-protected communicative materials, whether textual or visual. *Amici* are particularly concerned with the chilling effect of any test that reverses the presumption of First Amendment protection for factually false speech other than fraud, defamation, perjury, and other limited, recognized exceptions to the First Amendment.

Many of the *Amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws that infringe First Amendment rights. *See, e.g., United States v. American Library Ass'n*, 539 U.S. 194 (2003); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Powell's Books v. Kroger*, 622 F.3d 1202 (9th Cir. 2010); *American Booksellers Found. v. Strickland* 601 F.3d 622 (6th Cir. 2010); *PSInet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Found. v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D. N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

Amici also have filed a number of *amicus* briefs in this Court addressing First Amendment issues,

including the impact of speech regulations on mainstream creators, producers, distributors, retailers, and consumers. *See, e.g.*, *Brown v. Entertainment Software Ass'n*, 131 S. Ct. 2729 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Beard v. Banks*, 542 U.S. 406 (2004); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Denver Area Educ. Telecomms. Consortium v. F.C.C.*, 518 U.S. 727 (1996); *United States v. X-Citement Video*, Inc., 513 U.S. 64 (1994).

SUMMARY OF ARGUMENT

All speech is presumptively protected by the First Amendment against content-based regulation, subject only to a limited number of traditional exceptions. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). The Court has recognized exceptions to First Amendment protection for defamation, fraud, and a few other specific categories of speech, but not for non-defamatory and non-fraudulent false speech. To the contrary, this Court's "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

The "breathing room" test the Government derives through a distorted reading of *Sullivan* and other cases is disturbingly vague and sweeping in the authority it would accord Congress, state legislatures, and municipalities to regulate false

factual statements based on an asserted strong government interest.

The Government's defense of the Stolen Valor Act would, if accepted, open the door to government enforcement of the "truth," a concept smacking of authoritarianism that is antithetical to the core First Amendment principle that, as a general matter, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Fear of public exposure, rather than fear of criminal sanction, is the inducement to truth on which the Constitution requires us to rely outside of the traditional First Amendment exceptions.

On a practical level for the publisher *Amici*, if the Government's relaxed standard for restricting false factual statements were to take root, it could well make the fact-checking process excessively burdensome and fraught with risk by expanding the range of statements that would be subject to criminal sanction.

Even with respect to the Stolen Valor Act itself, the Government's rationale does not withstand scrutiny. The Government's assertion that the Act prohibits "a narrow category of known, objectively verifiable false representations about which a person is unlikely to be mistaken" is wrong as a matter of law and without basis in fact. The Act actually covers not only valor awards but also "any decoration or medal authorized by Congress for the Armed Forces of the United States" and "any of the service medals or badges awarded to the members of such forces." There are over 200 such medals and decorations and tens of millions of recipients.

Veterans are hardly immune from the human tendency—whether knowingly or not—to exaggerate one's accomplishments from earlier in life. This Court should not sustain Alvarez's conviction unless it also would be prepared to sustain the conviction of a veteran who falsely told a grandchild of having won the Navy Expert Rifleman Medal with a motive no more malicious than to interest the child in riflery. The First Amendment allows no such government intrusion on everyday discourse.

ARGUMENT

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THE STOLEN VALOR ACT VIOLATES THE FIRST AMENDMENT

1. All Speech Is Presumptively Protected Against Content-Based Regulation, Subject Only to "Historic and Traditional" Exceptions.

All speech is presumptively protected by the First Amendment against content-based regulation, subject only to specific historic exceptions. *R.A.V.*, 505 U.S. at 382; *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). As the Court recently explained:

> From 1791 to the present, . . . [the First Amendment has] "permitted restrictions upon the content of speech in a few limited areas." [These] "historic and traditional categories long familiar to the bar[ ]"[ ] includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct . . .

United States v. Stevens, 130 S. Ct. 1577, 1584

(2010) (citations omitted). *See also R.A.V.*, 505 U.S. at 382-83.

Neither as written, nor as construed by the Government, does the Stolen Valor Act fit within any of the traditionally recognized and specifically enumerated categories of unprotected speech.

Although the Court has designated fraudulent speech as categorically unprotected, not every false statement is fraudulent. Fraud requires intent to deceive and to induce another to act on the false statement to his or her detriment. *Black's Law Dictionary* 731 (9th ed. 2009). By its terms, the Act imposes strict liability, requiring neither intent to deceive nor intent to induce another to act. The Congressional finding that "[f]raudulent claims surrounding the receipt" of military medals threatened their reputation, Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266, uses "fraud" in a colloquial, rather than legal, sense. Xavier Alvarez was not accused of defrauding anyone. Nor does the Government contend that the Act should be construed as limited to cases of fraud.

In three recent First Amendment cases, the Court has made clear that it is reluctant, if not unwilling, to expand the categories of unprotected speech beyond the historic exceptions. In *Brown v. Entertainment Software Ass'n,* 131 S. Ct. 2729 (2011), the Court was urged to craft an exception for the sale of violent video games to minors; the Court declined to do so. In *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), the Court was urged to craft an exception for outrageous and upsetting speech in the vicinity of a private, military funeral; the Court declined to do so. And in *Stevens*, the Court was

urged to craft a new First Amendment exception for depictions of animal cruelty; the Court declined to do so.

Notably, the Government here does not urge the Court to recognize lies about military honors as a limited, *sui generis* new category of unprotected speech; rather, it advances the much more sweeping —even "startling and dangerous,"[3]—proposition that false factual statements are presumptively unprotected and may be restricted based on a strong government interest so long as "adequate breathing space" is left for protected speech. Gov't Br. at 19-20. This radical understanding of the First Amendment raises the very troubling prospect of the government acting as a roving truth commission – a concept alien to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270.

The Government invites the Court to encourage Congress, state legislatures, and municipalities to restrict any false factual speech in which the government can plausibly claim a "strong interest." *Amici* urge the Court to decline this invitation.

The First Amendment does not, for example, allow the government to make Holocaust denial a crime, as it is in some European countries.[4] It also

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[3] *Stevens*, 130 S. Ct. at 1585.

[4] *See, e.g.*, Law No. 90-615 of July 13, 1990, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 14, 1990, p. 8333; Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP [Verbotsgesetz] [Prohibition of the National *(cont'd)*

bars laws that exist or have been proposed in other countries against denying or affirming other historical events. For example, Nobel Prize winner Orhan Pamuk was charged in 2005 of violating Turkish law by stating that Turkey committed genocide against Armenians,[5] while France is now considering a law that would make denial of the Armenian genocide a crime.[6] If the French law were enacted, then anyone publishing on that subject would likely violate the law of either France or Turkey. Such regulation of public discourse is alien to our conception of free speech.

In *Brown*, the Court underscored its aversion to expanding the list of carve-outs from the First Amendment, holding that

> without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the "judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs."

131 S. Ct. at 2734 (quoting *Stevens*, 130 S. Ct. at 1585). Consistent with that constitutionally-

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Socialist German Worker's Party (NSDAP)] Staatsgesetzblatt [StGBl] No. 13/1945, as amended by Bundes-Verfassungsgesetz (B-VG) BGB1 III No. 148/1992 (Austria).

[5] Sarah Rainsford, *Author's trial set to test Turkey*, BBC NEWS, Dec. 14, 2005, http://news.bbc.co.uk/2/hi/ europe/4527318.stm.

[6] *See* Sebem Arsu, *Turkey Lashes Out Over French Bill About Genocide*, N.Y. TIMES, Dec. 23, 2011, at A9.

enshrined judgment in favor of free speech, the Court has understood the First Amendment to "create[] an open marketplace where ideas . . . may compete without government interference." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008).

The functioning of this free-speech "marketplace," in all its sometimes messy glory, would be seriously impaired if government were free to act as a truth police in whatever context it deemed the exercise of such power to be beneficial. The less-than-rigid demarcation between fact and opinion on subjects from evolution to climate change to health care would bring the Government's proposed test into collision with the principle of unfettered discourse that not only defines our society but distinguishes it from virtually every other.[7]

Surely if the Court held such a circumscribed understanding of the First Amendment, it would have identified "false statements of fact" (or, perhaps, "knowingly false statements of fact"), rather than the more limited traditional categories of fraud and defamation, as unprotected. That the Court has never done so requires it to reject the Government's theory of this case and to adhere to

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[7] *See* Greg Marx, *What the Fact-Checkers Get Wrong*, COLUM. JOURNALISM REV., Jan. 5, 2012, at http://www.cjr.org/campaign_desk/what_the_fact-checkers_get_wro.php?page=all ("A project that involves patrolling public discourse . . . would inevitably involve judgments not only about truth, but about what attacks are fair, what arguments are reasonable, what language is appropriate.").

the presumption in favor of constitutional protection. As the Court has cautioned concerning the dangers inherent in speech restrictions:

> "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society.

United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817 (2000).

II. The Government's Argument That False Speech Is Presumptively Unprotected Is a Radical Departure from the Court's Precedents.

The Government begins its analysis with the position that there is no presumption of First Amendment protection for false statements of fact—even if the speaker does not believe or know the statement to be false. The Government bases this contention on dicta and quotations cobbled together out of context to suggest that this Court had held that false speech is presumptively unprotected. *See* Gov't Br. at 13, 18, 20, 22, 26-27 and 35. Worse, in several places the Government alters the Court's language, for example by changing the Court's statement that "false statements may be unprotected for their own sake," *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 531 (2002), to "*false statements*

[are] unprotected for their own sake." Gov't Br. at 35 (italics added and "[are]" inserted by Government). *See also* Gov't Br. at 13, 18, 20.

Most of these quotations and citations upon which the Government relies come from cases involving defamation, an historic First Amendment exception that does not extend to false speech that is not defamatory. Neither *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), nor *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), on which the Government relies, stands for the proposition that false speech in general is presumptively unprotected.

In *Sullivan*, the issue was whether a subset of defamatory speech—false statements about a public official, relating to his or her official conduct—is protected by the First Amendment. The Court held that it is protected:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80. The Court held that although factual errors are "inevitable" in free debate, they "must be protected" if free speech is to have adequate "breathing space." *Id.* at 271.

In *Gertz*, the Court revisited the fault standard for defamatory falsehoods and held that

> so long as they do not impose liability without fault, the States may define for

> themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent."

418 U.S. at 347-48.

Neither *Sullivan* nor *Gertz* held or even suggested that the analysis of First Amendment protection for false speech commences with a presumption that false speech is *per se* unprotected. To the contrary, in *Sullivan,* the Court held:

> Authoritative interpretations of the First Amendment guarantees have consistently *refused to recognize an exception for any test of truth*—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.

376 U.S. at 271 (emphasis added). Nor does any other decision of this Court establish a "falsehood" exception to the First Amendment, notwithstanding the Court's observation in several cases that false statements of fact have no constitutional value.

In *Stevens,* the Court firmly rejected a similar effort to exclude assertedly valueless speech from First Amendment protection:

> As the Government correctly notes, this Court has often described historically unprotected categories of speech as being "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V., supra* at 383 (quoting *Chaplinsky* [*v. New Hampshire,* 315 U.S. 568, 572 (1942)]). In *New York v. Ferber,* 458 U.S. 747 (1982), we noted that within these categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required," because the balance of competing interests is clearly struck," *id.,* at 763-764. The Government derives its proposed test from these descriptions in our precedents....
>
> But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

130 S. Ct. at 1585-86.

The Government argues that the Court's recognition of various speech-related torts demonstrates that its "breathing room" theory is compatible with the First Amendment. *See* Gov't Br. at 24-26. But with respect to each of those torts, the Court imposed First Amendment-based limits on a long-established state-law cause of action in order to

resolve the conflict between the tort and the First Amendment. Here, there is no underlying tort. The "breathing room" rationale therefore cannot justify this new proposed incursion on the First Amendment any more than the exceptions clause in the statute at issue in *Stevens* could save the ban on depictions of animal cruelty. *See* 130 S. Ct. at 1590-91.

III. The Government's Proposed "Breathing Room" Test Fails Scrutiny

Because of the reprehensible nature of Alvarez's conduct, the temptation may be strong to fashion a narrow exception to the First Amendment that would allow the Court to sustain the Act, focusing on (a) false statements (b) by a person about him or herself (c) when there is a high degree of certainty that the person knew that the statement was false, and (d) there is a strong governmental interest in discouraging such statements. But it is a different matter to recognize historic exceptions to the First Amendment than it is to craft new ones. And the Government's proposed new rule — that false statements are presumed unprotected and are spared from restriction "only to the extent needed" to ensure that the restriction does "not chill truthful and other fully protected speech" (Gov't Br. at 13, 20) —fails First Amendment scrutiny.

A. The Proposed Test Is Vague and Threatening.

Using the criminal law to enforce truth-telling smacks of authoritarian societies, especially in relation to government policies or actions—matters in which the government's interest in the "truth," and thus its incentive to restrict speech, is at its

zenith. A government "truth commission" would seem to stand on its head the principle that the First Amendment "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Stevens*, 130 S. Ct. at 1585.

The open-ended nature of the Government's theory is alarming. What discernible limits are there to "supported by a strong governmental interest"? Is there a strong government interest in developing this country's natural resources and in energy independence that would justify criminalizing false statements about whether or not particular methods of gas and oil exploration harm the environment?

Surely, the nation has a compelling interest in the legitimacy of its President. But should that interest support making it unlawful to "falsely represent" that the President was born outside of the United States?

Can a state assert a strong state interest in maintaining the integrity of its university system and criminalize a false statement—made for any reason—that the speaker was a graduate of the state university?[8] Should a state be able to criminalize such a statement if made by a person about someone else?

As our troops were being sent into Iraq in 2003, the Government surely had a strong governmental interest in maintaining military morale by not

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[8] *See Strang v. Satz*, 884 F. Supp. 504 (S.D. Fla. 1995) (holding unconstitutional Florida statute making it a crime to falsely state that one had received a college degree).

having persons "falsely" claim that Iraq did not have weapons of mass destruction. If Congress had passed a law on the premise that such "false statements" were unprotected, those (in the media and others) who wished to argue that weapons of mass destruction were not present in Iraq, while the Government officially and repeatedly contended to the contrary,[9] would likely have been chilled by the prospect of criminal prosecution.

In November 1948, the Chicago Tribune published a false headline on a matter of the highest public interest — the outcome of the presidential election — with its now-famous headline "Dewey Beats Truman."[10] The Government's "breathing room" test could in theory be used to justify a viewpoint-neutral prohibition on the false reporting of presidential election results.

As easy as it is to ascribe non-trivial harm to lies about matters that implicate the public interest, we are, as a nation, better served by robust protection even for falsehoods concerning matters of public interest, based on the belief that the correction of error — and thus the bolstering of truth — through vigorous public dialogue is preferable to enforcement of truth by means of the criminal law. Matters that

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[9] Cent. Intelligence Agency, *Iraq's Weapons of Mass Destruction Programs* (2002), *available at* https://www.cia.gov/library/reports/general-reports-1/iraq_wmd/Iraq_Oct_2002.htm.

[10] Tim Jones, *Dewey defeats Truman: Well, everyone makes mistakes*, CHI. TRIB., http://www.chicagotribune.com/news/politics/chi-chicagodays-deweydefeatsstory,0,6484067.story (last visited Jan. 12, 2012).

implicate the public interest — such as whether, contrary to the conclusion of the Warren Commission, there was more than one person shooting at President Kennedy — are precisely the type of issues as to which a democracy should encourage robust discussion, even when there is a contrary official government position. In the words of Justice Brandeis,

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

Whitney, 274 U.S. at 377 (Brandeis, J., concurring).

The prospect of falsehood being exposed by news organizations, bloggers/citizen journalists, political opponents, the government itself, and others should serve as the primary check on any impulse to lie or simply get the facts wrong as well as the primary means by which the true facts are brought out. Indeed, as any regular cable news watcher well knows, exposure of errors in today's competitive market has become a staple of the contemporary media landscape.

Exposure of lies by the media and by ordinary citizens, whose powers of communication have been so dramatically enhanced by the Internet and other electronic media, both lessens any justification for government regulation and increases confidence in the truth that emerges from the collision with lies. Justice Holmes' famous dictum that "the best test of truth is the power of the thought to get itself

accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 620 (1919) (Holmes, J. dissenting), although stated with reference to opinions, should nevertheless guide the Court's approach to the far-reaching authority to enforce the "truth" that the Government seeks here.

Beyond those recognized categories of lies that cause real, direct harm, such as defamation, fraud, and perjury, there is societal value in allowing those who would lie to expose themselves and their erroneous views to public scrutiny, to appropriate condemnation, and, ideally, to correction.

It is healthy for us as a nation to know, for example, that some state (as an established fact, not as a matter of opinion) that climate change has been significantly caused by human activity, while others state (also as an established fact, not as a matter of opinion) that it has been caused only by natural forces, while still others state (also as an established fact, not as a matter of opinion) that there has been no climate change. The combination of information, assumption, conjecture, speculation, wishful thinking, and knowledge that may give rise to such views cannot be addressed if not revealed.

The foregoing principles cut strongly against the suggestion of Professors Volokh and Weinstein in their *amicus* brief that the Court should declare all false factual statements to be presumptively unprotected and then frame a series of exceptions to that rule. *See* Amicus Brief of Professors Eugene Volokh and James Weinstein at 22-31. The proposition that "when lawmakers think that a particular kind of lie is harmful enough, they should generally be free to prohibit it," *id.* at 29, is

frightening. Such a rule, with the litany of exceptions Professors Volokh and Weinstein admit would be required, would undoubtedly invite censorship pursuant to the government's view of the "truth" and its interpretation of what the professors concede are less than clearly delineated exceptions. *Amici's* concern is heightened by the possibility that states and other political entities could differ as to what the "truth" is.

As we next explain, such a scenario would be exceedingly problematic for content-providers whose businesses depend on the First Amendment.

B. The Proposed Test Poses a Significant Threat to *Amici*'s Free Speech Rights.

While the only *Amici* who could be prosecuted under the Act are individuals writing or speaking about themselves, if the Government's rationale for upholding the Act is accepted, all of *Amici*—writers, book publishers, newspapers, magazines, comic book publishers, retailers, and First Amendment advocacy organizations—would be adversely affected in two ways.

First, the authors and speakers whose work is disseminated by *Amici* could be prosecuted under the Act, and if the work of authors and writers is chilled, so is the work of those who publish and distribute their work.

Second, *Amici* are deeply concerned about the implications of reversing the presumption of First Amendment protection for assertedly false factual speech. To be sure, none of the *Amici* set out to spread falsehoods — quite the contrary. But misstatements of fact occur — through negligence, misunderstanding, mistake, inadequate fact-

checking resources, a desire to be the first to report an event, a fervent belief that blinds the speaker to the truth. *See Sullivan*, 376 U.S. at 271 ("erroneous statement is inevitable in free debate," but it "must be protected" if free speech is to have adequate "breathing space").

On a practical level, if the Court were to adopt the Government's test, it would invite Congress, state legislatures, and even municipalities to pass laws and ordinances imposing criminal or civil penalties for "false" speech — a development that would make the media's fact-checking (or "vetting") process far more burdensome. Publishers (especially book publishers) and other content-providers cannot check the accuracy of every fact they disseminate; doing so would be inordinately expensive and time-consuming. The level of fact-checking varies among the different types of media and from publisher to publisher. As a general matter, though, fact-checking to protect against legal liability is, not surprisingly, oriented primarily toward the historic First Amendment exceptions:

> Are there potentially damaging statements or depictions? Could they be deemed defamatory?
>
> Are there personally embarrassing statements or depictions? Do they invade privacy?
>
> Is there explicit sexual content? Is it obscene?

Although the Stolen Valor Act is limited to statements which the speaker has made about his or her own achievements, the Government's proposed test for unprotected false speech is not so limited.

Indeed, if the Court were to endorse the Government's sweeping "breathing room" rationale, it likely would prompt the passage of other federal, state, or local statutes criminalizing a potentially wide range of false statements. The consequent burden on—and risk to—content providers, fearful of being sued along with (or instead of) the source of a claimed falsehood, would become crushing and would lead to a chilling effect on protected speech.

If, for example, the Stolen Valor Act were extended to third-party publication of a veteran's receipt of a medal, then before publishing any story about a veteran, the publisher would have to independently verify whether the veteran had received a particular medal, or risk liability. Similarly, if a state were to criminalize publication of a false statement that an author (or another person) had graduated from a state university, a publisher would have to independently verify that information or risk a lawsuit. The vetting process—now concerned primarily with addressing the traditional First Amendment exceptions — would become prohibitively expensive and would, as a result, chill protected speech (*e.g.*, "Let's delete the statement in the obituary that he received the Purple Heart, because we don't have time to check.").[11]

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[11] Lawsuits against book publishers based on alleged false statements concerning, for example, (i) the author's life story (*see* Motoko Rich, *James Frey and His Publisher Settle Over Lies*, N.Y. TIMES, Sept. 7, 2006, http://www.nytimes.com/2006/09/07/arts/07frey.html); (ii) touted investment results (*see Keimer v. Buena Vista Books,*

(cont'd)

In short, the door the Government would have the Court open in order to uphold the Stolen Valor Act could usher in a perilous array of new risks and challenges for content providers. These risks and challenges would inevitably bring about a reduction of protected speech and an undermining of the robust conception of the First Amendment the Court has recently (in *Stevens*, *Phelps*, *Brown*, and other cases) emphatically reinforced.

IV. The Government's Assertion That "Section 704(b) Prohibits a Narrow Category of Known, Objectively Verifiable False Representations About Which a Person Is Unlikely to be Mistaken" Is Contrary to Law and Likely Contrary to Fact.

Xavier Alvarez is not a poster child for the First Amendment. It is hard to imagine that he did not know that his claim to have won the Congressional Medal of Honor was false.

But the Government's leap from Alvarez's reprehensible conduct to the broad assertion that "Section 704(b) prohibits a narrow category of

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Inc., 75 Cal. App. 4th 1220 (Cal. Ct. App. 1999)); and (iii) the Middle East peace process as described by Jimmy Carter (*see* Stephen Lowman, *President Carter named in $5 million lawsuit over his "Palestine" book*, WASH. POST, Feb. 2, 2011, http://voices. washington post.com/political-bookworm/2011/02/president_carter _named_in_5_mi.html) while ill-founded in *Amici*'s view, suggest the potential danger to content providers if the Court were to declare false factual statements unprotected by the First Amendment.

known, objectively verifiable false representations about which a person is unlikely to be mistaken" is wrong as a matter of law and—dare one say—false. Gov't Br. at 15.

First, the name of "The Stolen Valor Act" is misleading. The Act is not limited to "valor awards" —that is, awards for a person's "gallantry and intrepidity at the risk of his life above and beyond the call of duty," 10 U.S.C. § 3741 (Medal of Honor) or "extraordinary heroism," 10 U.S.C. § 3742 (Distinguished-Service Cross). The Act also covers "any decoration or medal authorized by Congress for the Armed Forces of the United States" and "any of the service medals or badges awarded to the members of such forces." 18 U.S.C. § 704(b). There are over 200 medals, decorations and awards covered by the Act, including, for example, an award to members of the U.S. Army Reserve "for successful completion of annual training or active duty for training for a period not less than 10 consecutive duty days on foreign soil"[12]; there tens of millions of recipients of medals and decorations.[13] The Act thus

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[12] *See* Armed Forces Info. Serv., Dep't of Def., *Armed Forces Decorations and Awards* 18 (1992).

[13] While no definitive figures exist for the number of living medal recipients, statistics published by the United States Army Human Resources Command are instructive. From December 5, 2001 to October 31, 2011 the United States Army awarded at least 972,459 individual decorations. Awards and Decorations Branch, U.S. Army Human Res. Command, *Awards Statistics*, https://www.hrc.army.mil/site/active/tagd/awards/Awards_Statistics.htm (last visited Jan. 12, 2012).

This number does not include recipients of the far more *(cont'd)*

does not cover "a narrow category ... of false representations." Indeed, a more accurate title for the Act would be the Stolen Military Medals, Decorations and Awards Act.

Second, it may well be that mistaken claims to have received the Congressional Medal of Honor are rare. But mistaken claims to have received other medals, decorations and awards covered by the Act are probably quite common. Veterans are hardly immune from the human tendency, whether knowingly or not, to exaggerate accomplishments from earlier in life. Yet, innocuous as it may be, a veteran who tells a grandchild of having been awarded the Navy Expert Rifleman Medal when, in fact, the veteran was an expert marksman but never received any medal or ribbon or had merely received

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numerous military campaign and service awards or ribbons also covered by the Act, nor does it include any decorations or awards from the four other branches of the United States Armed Forces. For example, these figures do not account for awards like the National Defense Service Medal, for which every active service member qualifies during specified times of national emergency. Army Reg. 600-8-22 § 2-10 (Dec. 11, 2006). These times of national emergency include the Korean War, Vietnam War, Gulf War, and the current War on Terrorism, with potential recipients numbering over 18 million. Def. Manpower Data Ctr., Dept. of Def. ("DMDC"), *Korean War – Casualty Summary*, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/korea.pdf (last visited Jan. 12, 2012); DMDC, *Vietnam Conflict – Casualty Summary*, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/vietnam.pdf (last visited Jan. 12, 2012); DMDC, *Persian Gulf War – Casualty Summary*, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/GWSUM.pdf (last visited Jan. 12, 2012); DMDC, *Armed Forces Strength Figures for October 31, 2011*, http://siadapp.dmdc.osd.mil/ personnel/MILITARY/ms0.pdf.

the Navy Rifle Marksmanship Ribbon, would technically violate the Act.

To be sure, one would expect the Department of Justice to have the good sense not to prosecute a veteran whose only offense was to try to impress a grandchild, whether or not the "false representation" was because of faulty memory or, on the other hand, was made with "scienter." But, as the Court stated in *Stevens,* the First Amendment

> protects against the Government; it does not leave us at the mercy of *noblesse oblige.* We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

130 S. Ct. at 1591.

Unless veterans rely on *noblesse oblige*, this well-meaning but wrongheaded law will have a chilling effect *on veterans,* the very people the Act is intended to honor. A veteran who truthfully describes his service but falsely claims the receipt of a medal is subject to prosecution and imprisonment for six months. Veterans concerned that their memory of what medals they received might be faulty would be chilled from speaking on the subject; they would, indeed, be well advised not to describe their military honors at all. (Ironically, a person who never served in the military but who makes false claims of having done so (without claiming to have received medals)[14] would not violate the Act.)

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[14] The amicus brief filed by 24 veterans groups states that fake claims of military service are a common and serious problem. *(cont'd)*

Given the breadth of the Act and the Court's sensible refusal to trust the safeguarding of First Amendment rights to government discretion, the Court should not sustain Alvarez's conviction unless it also would be prepared to sustain the conviction of a veteran who falsely told a grandchild of having received the Navy Expert Rifleman Medal, with a motive no more malicious than to interest the young man or woman in riflery.

Also flawed is the Government's claim that the receipt of a medal is "objectively verifiable." Gov't Br. at 47. A 1973 fire at the National Personnel Records Center damaged or destroyed the Army and Air Force records of over 16 million veterans who served between 1912 and 1964.[15] While alternative records are sometimes available, for these veterans, the claim of receipt of a military medal may not, in fact, be objectively verifiable. In addition, even if records are available, the suggestion that a veteran should request his own military records, to ensure the accuracy of his memory of having received a medal, seems a poor way to honor military service.

The Government's defense of the statute based on the assumption that the covered statements are objectively verifiable is also troubling because the Government offers no basis for distinguishing between this Act and a hypothetical prohibition

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See Amicus Brief of Veterans of Foreign Wars of the U.S., *et. al.* at 13-15.

[15] Nat'l Pers. Records Ctr., Nat'l Archives, *1973 Fire*, http://www.archives.gov/st-louis/military-personnel/fire-1973.html (last visited Jan. 12, 2012).

against dissemination by a third party, such as a publisher, of false statements that a person had received a military medal (or, in fact, any other false statement). There is no method by which the media or members of the public can verify whether another has received a military medal. According to the National Archives, through FOIA requests, members of the public can obtain access to limited facts about another's military service, including eligibility for awards and decorations, but not whether awards or decorations were, in fact, received.[16],[17]

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[16] "The public has access to certain military service information without the veteran's authorization or that of the next-of-kin (the un-remarried widow or widower, son, daughter, father, mother, brother or sister) of deceased veterans. Examples of information which may be available from Federal (non-archival) Official Military Personnel Files (OMPF) without an unwarranted invasion of privacy include . . . Awards and decorations (eligibility only, not actual medals)." Nat'l Pers. Records Ctr., Nat'l Archives, *Freedom of Information Act (FOIA) and The Privacy Act*, http://www.archives.gov/st-louis/military-personnel/foia-info.html (last visited Jan. 12, 2012).

[17] Respondent Alvarez notes that there is a privately-assembled database listing recipients of "the top three levels of award (Medal of Honor, Distinguished Service Cross, Navy Cross, Air Force Cross, and Distinguished Service Medals" as well as Silver Stars. Resp. Br. at 25-26. However, that database, which states that it contains "96,902 valor award citations," does not profess to be comprehensive even as to those medals (inviting website visitors to submit documentation to "have a name added"). Mil. Times Hall of Valor, *Valor Awards*, http://militarytimes.com/citations-medals-awards/list. php?category=Awards (last visited Jan. 12, 2012). In addition, that database, while covering the highest levels of the medals, does not cover the Purple Heart and most other medals, and includes less than one-half of one percent of the

(cont'd)

Amici would, of course, welcome having access to more information, and more reliable information, about medal recipients. But the use of such information should not be compelled by criminal sanctions.

Finally, the Government's interest in the Act falls short of what the First Amendment demands in terms of the requisite speech/harm nexus. Because fraud may be prosecuted without offending the First Amendment, the only interest assertedly protected solely by the Act is limited to the claimed harm to military morale said to flow from lying about (and thereby theoretically devaluing) military honors. This is a slender reed upon which to rest a new incursion on the First Amendment.

The Government contends that criminal penalties are required to protect the "integrity of the military award system." Gov't Br. at 54. But as *amicus* briefs in support of the Government amply document, false claims are regularly reported in the press, resulting in humiliation, shame, exhumation from Arlington National Cemetery, censure, and loss of employment.[18] It is telling that most of the citations to instances of exposure of false claims in the *amicus* briefs are to news stories—not to criminal prosecutions. For instance, the American Legion credits "[i]nvestigative journalists" with

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recipients of medals, awards, and decorations within the scope of the Act.

[18] Amicus Brief of Veterans of Foreign Wars of the U.S., *et. al.* at 13-16 (fn. 19, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33). Amicus Brief of The American Legion at 15-18.

exposing medals fraud.[19] The "integrity of the military award system" evidently relies more on a free press than on the threat of prosecution under the Act.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: January 19, 2012

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[19] Amicus Brief of The American Legion at 16.

APPENDIX

APPENDIX A

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AMICI CURIÆ

The following *amici curiæ* join this brief:

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

American Federation of Television and Radio Artists ("AFTRA") represents the people who entertain and inform America. In 32 locals across the country, AFTRA represents actors, broadcast journalists, singers, dancers, announcers, hosts, comedians, disc jockeys and other performers who work in the entertainment and media industries. With over 70,000 professional performers, AFTRA members are working together to protect and improve their jobs, lives, and communities in the 21st century. From new art forms to new technology, AFTRA members embrace change in their work and craft to enhance American culture and society.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover, paperback, and electronic books in every field, scholarly and professional journals, educational materials for the

elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

Entertainment Merchants Association ("EMA"), a prevailing party in *Brown v. Entertainment Merchants Ass'n,* 131 S. Ct. 2729 (2011), is the not-for-profit international trade association dedicated to advancing the interests of the $34 billion home entertainment industry. EMA-member companies operate approximately 40,000 retail outlets in the U.S. and 50,000 around the world that sell and/or rent DVDs, computer and console video games, and digitally distributed versions of these products. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores), distributors, the home video divisions of major and independent motion picture studios, video game publishers, and other related businesses that constitute and support the home entertainment industry.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

PEN American Center ("PEN") is a human rights and literary association based in New York City. Committed to the advancement of literature and the unimpeded flow of ideas and information, PEN fights for freedom of expression; advocates on behalf of writers harassed, imprisoned, and sometimes killed for their views; and fosters international exchanges, dialogues, discussions, and debates.

Village Voice Media Holdings, LLC ("Village Voice Media") publishes thirteen newspapers and websites, including Village Voice (New York), LA Weekly (Los Angeles), Westword (Denver), New Times (Phoenix), Houston Press (Houston), Observer (Dallas). Riverfront Times (St. Louis), New Times (Miami), City Pages (Minneapolis), New Times (Broward), OC Weekly (Orange County), Seattle Weekly (Seattle), and SF Weekly (San Francisco). Village Voice Media prints 1.7 million copies of its publications each week; its websites receive 17 million page views per week.

Writers Guild of America, West, Inc. (WGAW) is

a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television and new media industries. The WGAW's mission is to protect the economic and creative rights of the writers it represents.

AMICUS CURIAE BRIEF

No. 11-210

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

XAVIER ALVAREZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTHERN CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has been committed to protecting the freedoms guaranteed by the First Amendment since its founding in 1920, and has appeared before this Court in numerous free speech cases in the intervening nine decades, both as direct counsel and as *amicus curiae*. The ACLU of Southern California is a regional affiliate of the national ACLU. Because the government has chosen to rest its defense of the challenged statute on an unduly restrictive view of the First Amendment, the proper resolution of this case is a matter of significant concern to the ACLU and its membership throughout the country.

STATEMENT OF THE CASE

The Stolen Valor Act, 18 U.S.C. § 704(b), imposes criminal penalties on those who utter or write specific kinds of falsehoods about themselves. The Act states, in relevant part:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

> Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b).[2]

Xavier Alvarez was charged under the Act for statements he made at a water-district board meeting. As an elected member of the Board of Directors of the Three Valleys Municipal Water District in Pomona, California, Alvarez was asked to introduce himself at a public meeting of a neighboring water board. He introduced himself as a retired marine who had been awarded the Congressional Medal of Honor in 1987. This statement was false. Alvarez apparently made a habit of telling lies about his own accomplishments. Previously he had claimed to have played hockey for the Detroit Red Wings, to have worked as a police officer, to have been secretly married to a Mexican starlet, and to have rescued the Iranian ambassador during the 1979 hostage crisis.

There was no evidence that anyone had believed Alvarez's lie about the Medal of Honor, that anyone had relied on his statement, that anyone had been defrauded or otherwise injured by it, or even

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[2] The prescribed prison term is increased to one year if the decoration in question is the Congressional Medal of Honor, a distinguished-service cross, a Navy cross, an Air Force cross, a silver star, or a Purple Heart. 18 U.S.C. § 704(c),(d).

that Alvarez had *intended* to defraud or injure anyone. The government charged Alvarez under the Act nonetheless. Alvarez moved to dismiss the indictment, arguing that the Act was unconstitutional on its face and as applied. His motion was denied. He pled guilty, reserving his right to appeal the First Amendment ruling, and was ordered to pay a $100 special assessment and $5,000 fine, serve three years of probation, and perform 416 hours of community service.

The court of appeals reversed by a 2-1 vote. It wrote that "given our historical skepticism of permitting the government to police the line between truth and falsity . . . we presumptively protect all speech, including false statements." *United States v. Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010). It acknowledged that there are exceptions to the First Amendment's protection, but it found none of them applicable. It also pointed out that accepting the government's argument that false statements of fact are categorically unprotected by the First Amendment would permit the criminalization of many everyday conversations, and that this would be so even if the categorical exclusion were limited to intentional falsehoods. *See Alvarez*, 617 F.3d at 1200 ("if the Act is constitutional . . . then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway").

Having rejected the notion that false statements of fact are categorically excluded from the

First Amendment, the court of appeals addressed the nature of the government's asserted interest in this case. While acknowledging that the government's interest in preserving the integrity of its medals and military decorations was legitimate, the majority found that it was "just as likely that the reputation and meaning of such medals is wholly unaffected by those who lie about having received them." *Alvarez*, 617 F.3d at 1217. It further noted that there was no evidence that these lies have a "demotivating impact on our men and women in uniform"; to the contrary, it observed that "[t]he greatest damage done seems to be to the reputations of the liars themselves." *Id.* Finally, the court of appeals observed that the government had available to it many less speech-restrictive – and more effective – means to accomplish its stated purpose. *Id.* For example, as the court of appeals pointed out, the government already provides a published list of those who have won the Medal of Honor. *Id.* at 1210 n.11. The court of appeals therefore held that the Act failed strict scrutiny and was unconstitutional.

The government sought rehearing en banc, which was denied. In a concurring opinion supporting the panel opinion and responding to those who dissented from the denial of rehearing en banc, Chief Judge Kozinski wrote: "Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as 'rational basis review.'" *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, J., concurring).

This Court granted certiorari to determine whether the Act violates the First Amendment.

SUMMARY OF ARGUMENT

The Stolen Valor Act imposes criminal sanctions on those who falsely claim to have received certain official decorations or awards for military valor. The Act reaches oral statements as well as written ones, and private statements as well as public ones. It reaches statements that do not cause harm as well as those that do. It reaches statements made with intent to deceive, but it reaches satire and parody as well. On its face, it reaches even statements that the speaker does not know to be false. This sweeping content-based restriction of pure speech cannot survive strict scrutiny.

The government argues that the Act should not be subject to strict scrutiny because knowingly false statements are entitled to the First Amendment's concern, if at all, only to protect other speech that is fully protected. The First Amendment does not, however, "recognize an exception for any test of truth." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). While the Court has recognized a small number of exceptions to the First Amendment – "historic and traditional categories long familiar to the bar" – it emphasized only two years ago that these exceptions are "well-defined and narrowly limited," *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010) (internal quotation marks omitted), and none of the historic and traditional exceptions is implicated here. The government's contention that knowingly false statements are categorically

valueless relies almost entirely on dicta pulled out of context from this Court's defamation cases.

To be sure, this Court has held that certain false statements of fact – fraudulent and defamatory ones, particularly – are categorically excluded from the First Amendment. But the fraud and defamation exceptions have two features that are notably absent here: They have an established historical pedigree and they involve demonstrable injury to third parties. In this case, there was no reliance on defendant's statements, and there was no evidence that anyone except defendant himself suffered as a result of defendant's false claims. Neither reliance nor injury, in any event, is required by the statute.

The government argues that the Act is necessary to protect the prestige of official military honors, but it is well-settled that the government cannot constitutionally suppress speech in order to protect its own reputational interests. Moreover, the government's interest in protecting the integrity of its system of military honors could plainly be accommodated without restricting – and criminalizing – the speech that the Act purports to proscribe.

The government's proposal that a "breathing space" analysis would be sufficient to protect the First Amendment interests at stake here should be rejected because its underlying premise – that knowingly false statements of fact are categorically worthless – is constitutionally and empirically unsound. It is true, of course, that some false statements lack obvious social value; some are offensive, cowardly, distressing and even harmful to others. Many knowingly false statements, however

serve important social interests – this is certainly true of satire and parody, at least – and many others are integral to autonomy and self-fulfillment interests that the First Amendment has long been understood to protect. In addition, in many contexts truth is contested; investing the government with the general power to declare speech to be constitutionally valueless on the grounds of its "falsity" would give the government sweeping power to control and censor public debate. It would also permit unprecedented governmental intrusion into private conversations, including the most intimately personal ones.

Because the Act cannot survive strict scrutiny, the Court should affirm the decision below.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT CONTAIN A CATEGORICAL EXCLUSION FOR FALSE STATEMENTS OR KNOWINGLY FALSE STATEMENTS.

The Stolen Valor Act imposes criminal penalties on those who utter or write specific kinds of falsehoods about themselves. There is no dispute that the Act regulates pure speech. Nor is there any dispute that it regulates pure speech based on its content. Ordinarily, the Court's analysis of such a statute would be straightforward. "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (alterations and internal quotation marks omitted). Here, however,

the government argues that the speech regulated by the challenged Act is beyond the reach of the First Amendment. Gov't Br. 18. It proposes that "knowingly false statements" are constitutionally protected only to the extent necessary to preserve breathing space for speech that is fully protected. Gov't Br. 16-20,[3] and it asks the Court to discard the analytical framework it ordinarily applies to content-based regulations of speech in favor of a novel "breathing space" analysis that balances the regulation's purported costs against its purported benefits. Gov't Br. 20-21.

The Court rejected a similar proposal in *Stevens*, and it should reject the government's proposal here. "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Stevens*, 130 S.Ct. at 1585. While the Court has carved out exceptions to the First Amendment's protection, the "historic and traditional categories long familiar to the bar" – including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct – "are well-defined and narrowly limited." *Id.* at 1584 (internal quotation marks omitted).

Indeed, over the last quarter century, the Court has repeatedly rejected the government's efforts to carve out new exceptions to the First Amendment's protection. *See, e.g., Ashcroft v. Free*

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[3] The government argues that the Act can be construed to reach only statements that are "knowingly" false. Gov't. Br. 16. As discussed herein, the Act is unconstitutional even if so construed.

Speech Coal., 535 U.S. 234, 246 (2002) (declining to recognize virtual child pornography "as an additional category of unprotected speech"); *United States v. Eichman*, 496 U.S. 310, 315 (1990) ("The Government . . . invites us to reconsider our rejection in *Johnson* of the claim that flag burning as a mode of expression, like obscenity or 'fighting words,' does not enjoy the full protection of the First Amendment. . . . This we decline to do."); *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (declining to find that an "outrageous" political cartoon was the "sort of expression . . . governed by any exception to the general First Amendment principles"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976) (rejecting prior precedent that commercial speech was entirely beyond the protections of the First Amendment); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 589 (2001) (Kennedy, J., concurring) ("In effect, [the Respondents] seek a 'vice' exception to the First Amendment. No such exception exists.").

The Court's "hesitancy" to "mark off new categories of speech for diminished constitutional protection" reflects appropriate "skepticism about the possibility of courts' drawing principled distinctions to use in judging governmental restrictions on speech and ideas." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 804-05 (1996) (Kennedy, J., concurring in part and dissenting in part). The trend in recent years has been to limit rather than expand the categories of speech that are unprotected. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

The Court's deeply skeptical attitude towards proposed new exceptions to the First Amendment is entirely justified. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 130 S.Ct. at 1585. In *Stevens*, the Court left open the possibility that it might in the future recognize exceptions to the First Amendment for "some categories of speech *that have been historically unprotected*," but it expressly disclaimed the "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." 130 S.Ct. at 1586 (emphasis added); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring) (stating when "a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm . . . . [n]o further inquiry is necessary to reject the State's argument that the statute should be upheld"). The authority the government asks the Court to exercise here is precisely the "freewheeling authority" the Court disclaimed in *Stevens*.

Insofar as the government argues that the Court has *historically* recognized an exception to the First Amendment for knowingly false statements,

the argument is simply incorrect.[1] The Court has observed repeatedly that the "very purpose" of the First Amendment was to ensure that each person could be "his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945); *see also Meyer v. Grant*, 486 U.S. 414, 419 (1988) ("The First Amendment is a value-free provision whose protection is not dependent on 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" (citations omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)); *N.Y. Times Co.*, 376 U.S. at 271 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth."). The First Amendment was meant to ensure that the government would not become the arbiter of truth in the marketplace of ideas; it was "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us." *Cohen v. California*, 403 U.S. 15, 24 (1971).

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[1] As Judge Smith noted below, this Court's "standard list of categorically exempt speech has never used the phrase 'false statements of fact.' Instead, the Court has limited itself to using the words defamation (or libel) and fraud." *Alvarez*, 638 F.3d at 670 (Smith, J., concurring in the denial of rehearing en banc). The government rightly acknowledges that "the broad general category of false factual statements has *not* historically been treated as completely unprotected by the First Amendment." Gov't Br. 19 (emphasis added). It argues nonetheless that this Court should recognize an exception to the First Amendment for knowingly false statements.

The government's argument that knowingly false statements are presumptively unprotected is based almost entirely on isolated language drawn from a handful of cases decided after *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). The government places more weight on this language than it can bear. *Cf. Perry v. New Hampshire*, No. 10-8974, 2012 WL 75048, at *8 (U.S. Jan. 11, 2012) (expressing concern over parties attempt to remove statement from "its mooring" and "thereby attribute[] to the statement a meaning a fair reading of our opinion does not bear"). Most of the cases the government cites focused specifically on the scope and import of the defamation exception. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 69-72 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-45 (1974). To the extent these cases include broad language about the constitutional value of false statements, context makes clear that the cases were concerned with defamatory statements in particular, not false statements more generally. *See also Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967) ("We held in *N.Y. Times* that calculated falsehood enjoyed no immunity *in the case of alleged defamation of a public official concerning his official conduct*. Similarly, calculated falsehood should enjoy no immunity *in the situation here presented us*." (emphases added)); *Nike Inc., v. Kasky*, 539 U.S. 654, 664 (2003) (Stevens, J., concurring in dismissal of writ as improvidently granted) (observing that the Court's statement in *Gertz* that false statements of fact are unprotected was "perhaps overbroad[]"); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 477 (1996) (noting "[t]he near absolute

protection given to false but nondefamatory statements of fact outside the commercial realm").

The cases the government cites cannot fairly be read to stand for the proposition that knowingly false statements in general have the same constitutional status as defamatory statements in particular. Indeed, accepting the government's argument would render the defamation exception entirely superfluous. To accept the government's argument would be to reconceive the well-defined defamation exception as but an instance of a far broader one whose contours the Court has never described and the implications of which the Court has never considered.[5]

A careful reading of the cases cited by the government confirms that defamation is excepted from the First Amendment's protection not because defamatory statements are knowingly false but because they are knowingly false *and cause harm to others*. *See, e.g., N.Y. Times Co.*, 376 U.S. at 271 ("The question is whether [the challenged speech] forfeits that protection by the falsity of some of its factual statements *and by its alleged defamation of respondent*."); *Gertz*, 418 U.S. at 347 (holding that, so long as they do not impose liability without fault, States may impose liability for defamatory

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[5] It is also worth noting that the exception the government proposes here would be, in an important sense, far broader than the exceptions the Court has rejected in the past. The rejected exceptions – for virtual child pornography and depictions of animal cruelty, for example – would have rendered speech about specific subjects beyond the First Amendment's reach. The exception the government proposes here, by contrast, would subject speech about *every* subject matter to potential regulation.

statements "injurious to a private individual"). Where the Court has allowed the imposition of liability for other historically unprotected categories of speech, such as fraud and perjury, it has insisted on analogous limitations. *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) ("In a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a [speaker] to fraud liability. . . . [T]he complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so."); *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). As Judge Smith noted below, "circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements that serve to narrow what speech may be punished." *Alvarez*, 617 F.3d at 1200.

Indeed, the Court has made clear that at least some knowing falsehoods are altogether beyond the reach of government regulation. In *N.Y. Times Co.*, the Court discussed at length the Sedition Act of 1798, which made it a crime to publish "any false, scandalous, and malicious writing or writings against the government of the United States . . . with intent to defame . . . or to bring [it] . . . into contempt or disrepute." Sedition Act of 1798, 1 Stat. 596. The Court noted that it had not had occasion to rule on the Act's constitutionality but that "the attack upon [the Act's] validity has carried the day in the court of history." *N.Y. Times Co.*, 376 U.S. at 276. Congress repaid fines that had been levied under the Act; the

President pardoned those who had been convicted under it; in various cases the Act's unconstitutionality was assumed by Justices Holmes, Douglas, Brandeis, and Jackson. *Id.* Over time there developed "a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id.* Today it is well-settled that false statements about a government agency may not be punished at all. "For good reason, 'no court of last resort in this country has ever held, or even suggested, that that prosecutions for libel on government have any place in the American system of jurisprudence.'" *Id.* at 291 (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)); *see also Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966).[6]

The government allows that some false statements may be protected, but it contends that this protection is only instrumental. False speech is protected, the government argues, only to the extent necessary to preserve breathing space for other speech that is fully protected. Gov't. Br. 18-20. The government is correct, of course, that the protection for false statements preserves breathing space for true statements. *See, e.g., N.Y. Times Co.*, 376 U.S.

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[6] Because restraints on speech meant to protect government reputational interests are *categorically* impermissible under the First Amendment, the Court can resolve this case without deciding the constitutional status of knowingly false statements as a general category. Whatever the constitutional status of knowingly false speech in general, it is well-settled that the government cannot suppress speech – even knowingly false speech – in order to protect its reputational interests. As discussed further below, the Act challenged here is, at bottom, an effort to protect a governmental reputational interest.

at 271-72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' they 'need . . . to survive'") (internal citation omitted); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding . . . will create the danger that the legitimate utterance will be penalized . . . . [As a result] a person must steer far wider of the unlawful zone."). This Court has never held, however, that non-defamatory false statements are protected *only* to preserve breathing space for true statements. To the contrary, the Court has recognized that, while there are exceptions to the rule, false statements are protected *in their own right*, not simply instrumentally. *See, e.g., N.Y. Times Co.*, 376 U.S. at 271 ("The constitutional protection does not turn on 'truth, popularity, or social utility of the ideas and beliefs which are offered.'" (internal citation omitted)); *NAACP*, 371 U.S. at 445; *Cohen*, 403 U.S. at 23-24.

To accept the government's theory, moreover, would turn the First Amendment on its head. For a broad category of speech, speakers would bear the burden of demonstrating that their expression should be protected; the government would be spared the ordinary burden of demonstrating that the expression should be suppressed. *See Philadelphia Newspapers, Inc, v. Hepps*, 475 U.S. 767, 776-77 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."); *Speiser*,

357 U.S. at 526 ("Where the transcendent value of speech is involved . . . the State bear[s] the burden of persuasion to show that the [defendant] engaged in criminal speech."); *N.Y. Times Co.*, 367 U.S. at 271 (rejecting rule that would "put[] the burden of proving truth on the speaker"). Even more perniciously, within this broad category of speech knowingly false statements would be protected only if the speaker could show that the suppression of those statements would chill the expression of "speech that matters" – speech that is protected in its own right. It is difficult to imagine many contexts in which a speaker would be able to carry this burden. As Judge Smith observed below,

> [I]n nearly *every* case, an isolated demonstrably false statement will not be considered 'necessary' to promoting core First Amendment values, and will often be contrary to it. In nearly every case, the false statement will be outweighed by the perceived harm the lie inflicts on the truth-seeking function of the marketplace of ideas. Using such an approach, the government would almost always succeed.

Alvarez, 617 F.3d at 1204 (emphasis in original). [7]

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[7] The government's *amici* propose that the Court should recognize a categorical exception to the First Amendment for knowingly false statements but also recognize exceptions to the exception for (at least) statements concerning science and history, statements about the government, fiction, parody, humor, and hyperbole. Volokh & Weinstein Br. 22-24. This approach would turn a relatively clear mandate – "Congress shall make no law..." – into a patchwork of amorphous caveats

The implications of the government's proposal would be far-reaching. Under the government's proposal, the First Amendment permits the government to impose criminal penalties on the blogger who contends that President Obama is not a citizen of the United States; that the U.S. government was responsible for the bombing of Pan Am Flight 103 over Lockerbie; or that Trig Palin is Sarah Palin's grandson, not son. It permits the government to imprison the job-seeker who falsely states, on a networking site, that he can type 60 words per minute; on the student who, during a campaign for student council, falsely represents that she has attended every one of the football team's games; or on the date-seeker who falsely represents, on Match.com or eHarmony.com, that he is a full 6 feet tall.

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and reservations. One virtue of a rule that presumptively protects knowing false statements is that it spares courts the task of separating, say, parody from earnestness. This task is not always easy. *See, e.g.*, Charles McGrath, *How Many Stephen Colberts Are There?*, N.Y. Times Magazine, Jan. 4, 2012 ("But those forays into public life were spoofs, more or less. The new Colbert has crossed the line that separates a TV stunt from reality and a parody from what is being parodied.").

Amici Volokh and Weinstein contend that a rule generally protective of knowingly false statements would require the Court to recognize "many narrow exceptions." Volokh & Weinstein Br. 13. As they acknowledge, however, the converse is also true: a rule generally *unprotective* of knowingly false statements would also require the Court to recognize many exceptions. *Id.* at 22-24. It is worth noting that some of the purported First Amendment exceptions that Volokh and Weinstein identify are better understood as aspects of the defamation and fraud exceptions. Many of the others have never been endorsed by this Court.

There is no question, of course, that some statements that are knowingly false lack obvious social value; some are offensive, cowardly, distressing and even harmful to others. Many statements that are knowingly false, however, serve important social interests. This Court has already recognized that satire and parody can sharpen political debate. *Hustler Magazine, Inc.*, 485 U.S. at 53-54 ("[F]rom the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate"). False statements can also lead those who articulate the truth to do so more clearly, and more compellingly. *See, e.g., N.Y. Times Co.*, 376 U.S. at 276 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" (quoting John Stuart Mill, *On Liberty* 15 (1947))).

Moreover, many false statements are entwined with autonomy and self-fulfillment interests that the First Amendment has long been understood to protect. As Judge Kozinski observed below, for example, perfectly respectable people lie in order to protect their privacy, avoid hurt feelings, make others feel better, avoid recriminations, prevent grief, maintain domestic tranquility, avoid social stigma, avoid loneliness, set up surprise parties, stall for time, keep up appearances, duck minor obligations, maintain their public image, make a point, save face, avoid embarrassment, protect themselves or others from prejudice and bigotry, or simply entertain. *Alvarez*, 638 F.3d at 674-75 (Kozinski, J., concurring).

The First Amendment surely does not permit the government to regulate – and criminalize – all of this speech. "The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression." *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); *id.* ("Such [self] expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's self worth and dignity"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (observing that freedom of speech helps "make men free to develop their faculties"); Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982) ("constitutional guarantee of free speech ultimately serves only one true value . . . 'individual self-realization'"); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 881 (1963) ("Thought and communication are the fountainhead of all expression of the individual personality. To cut off the flow at the source is to dry up the whole stream. Freedom at this point is essential to all other freedoms.").

The point is not that these commonplace lies and deceptions are justified or useful or appropriate (or not); the point is that the First Amendment generally leaves this matter to the individual, not the government, to resolve. *N.Y. Times Co.*, 376 U.S. at 275 ("[I]n a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the

Government, and not in the Government over the people'" (quoting 4 Annals of Congress 934 (1794))).[5]

II. THE STOLEN VALOR ACT CANNOT SURVIVE STRICT SCRUTINY.

There is no dispute that the Stolen Valor Act criminalizes speech because of its content. Because the Act imposes a content-based restriction on speech, and because that speech is not categorically excluded from First Amendment protection, the Act is invalid "unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2738 (2011) (citing *R.A.V.*, 505 U.S. at 395); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) ("Content based regulations are presumptively invalid, and the Government bears the burden to rebut that presumption." (internal citation omitted)). A governmental interest is "compelling" only if it is an "interest[] of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). A law is narrowly tailored only if it is the least restrictive means of achieving

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[5] The government attempts to soften the implications of its proposal by emphasizing that the statute at issue in this case suppresses only falsehoods that are "objectively verifiable." Gov't. Br. 47. The First Amendment exception that the government urges the Court to accept, however, is not limited to objectively verifiable falsehoods. In any event, many objectively verifiable falsehoods are worthy of protection, for reasons discussed below. It is also worth remembering that some "objectively verifiable" falsehoods have turned out, in the end, to be spectacularly true. *See, e.g.*, Nicholas Copernicus, STANFORD ENCYCLOPEDIA OF PHIL. (Aug. 16, 2010) http://plato.stanford.edu/entries/copernicus/.

the government's interest. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 879 (1997).

The government argues that it has a compelling interest in "protecting the integrity of the military honors system." Gov't Br. 37. Its core concern is that false claims undermine the reputation and prestige of military honors and thereby undermine the government's ability to foster morale within the military and express official gratitude to military heroes. Gov't Br. 42 ("false claims diminish the value and prestige of the medals for servicemembers by creating the impression that many more people have received military honors than is actually the case").

While the government's interest in protecting the integrity of the military honors program is legitimate, it is not "compelling" within the meaning of First Amendment doctrine. To the contrary, this court has properly recognized that there is something particularly insidious about official restrictions on speech that are meant to protect reputational interests belonging to the government. *See, e.g., N.Y. Times Co.*, 376 U.S. at 291 ("[N]o court of last resort in this country has ever held, or even suggested, that that prosecutions for libel on government have any place in the American system of jurisprudence." (internal quotation marks omitted)); *id.* at 270 (remarking on our "profound national commitment to the principle that debate on public issues should be uninhibited" and noting that this debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government").

The Court has been particularly hostile to restraints meant to protect the reputation of official

institutions and symbols. *See, e.g., N.Y. Times Co.*, 376 U.S. at 272-73 ("[T]his Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains 'half truths' and 'misinformation.'" (citing *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331, 342, 343, n.5, 345 (1946))); *id.* at 276 (quoting with approval President Jefferson's explanation of his decision to pardon those convicted under the Sedition Act: "I discharged every person under punishment or prosecution under the sedition law because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." (citation omitted)); *Texas v. Johnson*, 491 U.S. 397, 415-16 (1989) ("nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it"). While the Stolen Valor Act criminalizes claims rather than criticism, the interest the government asserts here is one that the Court has repeatedly found insufficient to justify restraints on speech.[9]

Even if the governmental interest asserted here could be sufficient in some hypothetical context to justify a content-based restraint on speech, there

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[9] Particularly because the Act proscribes satire and parody, the distinction between "claims" and "criticism" here is a distinction without a difference. The government contends that the Act "does not restrict expression of opinion about military policy, the meaning of military awards, the values they represent, or any other topic of public concern." Gov't Br. 13, but whether a false claim expresses any of these things depends on context.

is little evidence that protecting the government's interest here actually requires such a restraint. There is no evidence that false claims about military decorations are widespread. Nor is there evidence false claims have had a "demotivating impact on our men and women in uniform." *Alvarez*, 617 F.3d at 1217. When false claims have been exposed, the pretenders have been condemned and ostracized, and the prestige of military honors has been, if anything, enhanced. *Id.* ("The greatest damage done seems to be to the reputations of the liars themselves."); Veterans of Foreign Wars of the United States, et al. Br. 1 ("there is nothing that charlatans such as Xavier Alvarez can do to stain their honor"). And there is every reason to believe that most false claims will be exposed. Publicly available lists and databases already allow easy confirmation of claims relating to the Medal of Honor.[10] Recent news stories confirm that claims relating to military service and military honors – particularly claims made by public officials and candidates for public office – are closely scrutinized by the news media; claims relating to the Medal of Honor, which appear to be of special concern to the government, Gov't Br. 42, have been subject to particularly searching scrutiny.[11]

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[10] *See, e.g.*, *Medal of Honor*, U.S. Army Center of Military History (Dec. 3, 2010), http://www.history.army.mil/moh.html; *Search for Medal of Honor Recipients*, National Park Service Civil War Soldiers and Sailors System, http://www.itd.nps.gov/cwss/medals.htm (last visited Jan. 18, 2012); *Search Purple Heart Recipients*, National Purple Heart Hall of Honor, http://www.thepurpleheart.com/recipient (last visited Jan. 18, 2012).

[11] *See, e.g.*, Michael Taylor, *Tracking Down False Heroes: Medal of Honor Recipients Go After Imposters*, S.F. Chron., May 31,

If the government believes that existing mechanisms are insufficient to assure the integrity of the military honors system, the government has available to it other mechanisms that would not burden protected speech. It could create a comprehensive database of military honors recipients or otherwise publicize the names of legitimate recipients and false claimants. It could undertake public education campaigns meant to foster respect for military honors. It could criminalize false claims intended to secure government benefits. The Court cannot ignore the availability of these less restrictive alternatives. *See, e.g., Playboy Entm't Group, Inc.*, 529 U.S. at 816 (holding that speech-restrictive provisions in the Telecommunications Act of 1996 were not narrowly tailored because the government could protect its interests by publicizing the availability of a channel-blocking feature); *Reno*, 521 U.S. at 879 (holding that speech-restrictive provisions of the Communications Decency Act were not narrowly tailored because the interests asserted by the government could be accommodated through filters and website tagging); *see also Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("when there is time to expose through discussion the falsehoods and fallacies [of the speech], to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

1999, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1999/05/31/MN106963.DTL&ao=all; Abigail Klingbeil, *FBI Agent Nails Medal of Honor Imposters*, The Saratogian, July 4, 1998, *available at* http://www.homeofheroes.com/a_homepage/community/imposters/cottone.html.

Finally, even if a restraint on speech is assumed to be necessary to achieve the government's interest here, the Act reaches too far. The Act reaches oral statements as well as written ones, and private statements as well as public ones. It reaches statements that do not cause harm as well as those that do. It reaches statements made with intent to deceive, but it also reaches satire and parody. The Act reaches the late-night television personality who, in a satirical effort to burnish his national security credentials, claims to have been awarded a Purple Heart. It reaches the stage actor who, playing a part, claims to have received the Medal of Honor. It reaches the undercover investigator who, in an effort to infiltrate a group suspected of defrauding veterans, claims to have received the Navy's silver star. It reaches the satirist, the actor, the comic, the investigator, the eccentric, and the common braggart. It reaches them whether their claims are made in a newspaper ad, a public speech, a dinner table conversation, a love letter, a blog post, or a tweet. And it reaches them even if their claim was not intended to deceive, no one relied on it, no one was harmed by it, and no one other than the government paid it any attention. Even if the governmental interest asserted here is assumed to be compelling, the Stolen Valor Act sweeps far more broadly than necessary to serve this interest.

The Act cannot survive strict scrutiny.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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v.

XAVIER ALVAREZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Stolen Valor Act, 18 U.S.C. § 704(b), is facially invalid under the Free Speech Clause of the First Amendment.

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IN THE

Supreme Court of the United States

No. 11-210

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN LEGION SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The American Legion is a nonpartisan, not-for-profit organization that was chartered and incorporated by Congress in 1919. It is the nation's largest veterans service organization. It is committed to mentoring and sponsorship of community youth programs, advocating

[1] All counsel of record consented to the filing of this *amicus* brief. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

patriotism and honor, promoting a strong national defense, and continued devotion to service members and veterans.

The Legion offers a number of programs and activities that reflect its commitment to America's veterans. The Heroes to Hometowns program is the only nationwide reintegration assistance service for wounded veterans from Iraq and Afghanistan. Additionally, millions of dollars in donations have been given to veterans and their families in times of grief, and various scholarship opportunities advance the future success of America's youth.

Legionnaires' sense of obligation to their community, state, and nation drives an honest advocacy for veterans in Washington and in the courts. The Legion works tirelessly to promote veterans' rights and quality of life. To this end, the Legion has long supported legislative efforts, such as the Stolen Valor Act, to protect veterans and their families from the negative effects of false claims concerning military medals. Those false claims diminish the sacrifices of America's military heroes and allow imposters to reap undeserved benefits that should be reserved for those who earned them. The court of appeals' decision removed the protection against such harms afforded by the Stolen Valor Act. Because the court of appeals misinterpreted the First Amendment as a shield for damaging falsehoods that have historically been censured, it should be reversed.

SUMMARY OF ARGUMENT

> The Constitution does not guarantee freedom; that's a piece of paper. The only thing that guarantees your rights is the willingness of citizens to stand up against our enemies. And one of the only things they get is decorations—62 cents of material, but they're the esteem of the nation bestowed upon you. When it's desecrated, it weakens our resolve. It's an emotional thing . . . and you can't understand the depth of that emotion unless you were there.
> — Lt. B.G. Burkett, U.S. Army (ret.), recipient of the Bronze Star and author of *Stolen Valor: How the Vietnam Generation Was Robbed of Its Heroes and History* (1998).[2]

The medals and decorations awarded to members of the United States Armed Forces are evidence of the valor and sacrifice of those who receive them. They are bestowed by grateful Americans upon those who have heroically fought, suffered, and in many cases given their lives for the cause of freedom. Those who receive such medals are rightfully honored.

This case involves a statute designed to prevent imposters from tarnishing the medals and decorations of America's military heroes. The Stolen Valor Act, 18 U.S.C. § 704(b), prohibits, *inter alia*, persons from falsely representing that they were awarded "any decoration or medal authorized by Congress for the Armed Forces of the United States." Violating the Act is a criminal offense.

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[2] Quoted in Edward Collimore, *Pinning Crime on Fake Heroes: N.J. Agent Helps Expose and Convict Those with Bogus U.S. Medals*, Phila. Inquirer, Feb. 11, 2004, at A01 (hereinafter, *Bogus U.S. Medals*).

That these lies are punishable is entirely appropriate. Persons who fraudulently claim military medals steal from a centuries-old store of goodwill built by the sacrifice of America's soldiers. When they lie, imposters reap substantial benefits, including increased social and political standing, honor, and even financial rewards. For those who have received military honors, as well as for the families of those who paid the ultimate price for freedom, the effect of such fraudulent claims is devastating.

The First Amendment does not bar the United States from punishing imposters who lie about receiving military medals. This Court has repeatedly stated that false statements of fact, standing alone, deserve no First Amendment protection. Lies about receiving military medals fit squarely within that category of unprotected speech and have been subject to censure since the founding moments of our nation. None other than George Washington warned: "Should any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished." *General Orders of George Washington Issued at Newburgh on the Hudson 1782-1783* 34 (Edward C. Boynton ed., 1883; reprint 1909) (hereinafter, *General Orders*).

Washington's injunction has been enshrined in law and custom for centuries. Beginning in the nineteenth century, Congress enacted a series of statutes setting forth detailed criteria for military decorations, prohibiting the fraudulent wearing of decorations, and limiting their sale. The Stolen Valor Act is only the most recent congressional effort to preserve the integrity of military decorations by combating fraudulent claims to them. This deep and rich history counsels against clothing false claims of military honors with constitutional protection.

Regulating these lies poses no threat to constitutional values—such as freedom of the press, political speech, religious speech, or the advocacy of ideas. Rather, the

Stolen Valor Act targets a specific untruth that is easy to identify and that disserves the interests of all Americans. False claims to valor have warped historical accounts of America's military endeavors, diluted the honor due to true military heroes, and caused untold pain to service members, veterans, and their families. The Stolen Valor Act is a necessary tool to preserve vital military honors and ensure that America's true heroes receive the quiet recognition to which they are entitled.

The American Legion respectfully submits this brief to offer an historical overview of laws combating fraudulent claims to medals and to provide a definitive statement by America's largest veterans service organization concerning the acute harm that flows from such claims. The historical evidence shows that false claims of military honor have never been viewed as protected speech, and that government has always pursued its legitimate interest in suppressing this uniquely pernicious species of fraud. The harm that this fraud causes to America's military and to society as a whole counsels deference to Congress's historically rooted determination that a narrowly tailored prohibition is necessary.

ARGUMENT

I. Throughout History, The United States Government Has Sought To Preserve The Integrity Of Military Honors And To Punish Those Who Falsely Claim Them.

A. Military Honors Are Intertwined With Our Nation's Founding.

On August 7, 1782, General George Washington announced the creation of the first U.S. military decoration, "the figure of a heart in purple cloth." *General Orders*, *supra*, at 35. It would be awarded to recognize a "singularly meritorious action," "instances of unusual gallantry," or "extraordinary fidelity and essential service."

Ibid. To guard against erroneous awards, Washington required that the decoration be conferred only after a showing of "incontestable proofs" of merit, and he directed that "the name and regiment of the person, with the action so certified, are to be enrolled in the Book of Merit which will be kept at the Orderly Office." *Ibid.*

At the same time, Washington also announced the creation of two lesser decorations: honorary badges to be given to those "who have served more than three years with bravery, fidelity and good conduct" and to those who have served for more than six years with "equal distinction." *General Orders*, *supra*, at 34. By recognizing such levels of valor and service, Washington hoped to "cherish a virtuous ambition in his soldiers" and "encourage every species of military merit." *Id.* at 35. Because the decorations were not reserved solely for officers, General Washington added: "The road to glory in a patriot army and a free country is thus opened to all." Fred L. Borch, *For Military Merit: Recipients of the Purple Heart* 2 (2010).

Washington recognized the value of these newly created decorations and the temptation to falsely claim them. He warned: "Should any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished." *General Orders*, *supra*, at 34. Washington subsequently issued an order to prevent "misapplication" of the decorations. *Id.* at 35. He clarified that retired soldiers were ineligible, and that he would not bestow "any honorary distinction" on a disgraced or punished soldier, "unless he shall have wiped away the stain his reputation has suffered by some very brilliant achievement." *Id.* at 35–36.

Early Congresses also took an active role in promoting military achievement by awarding special medals to recognize outstanding service and commemorate important victories. The Continental Congress instructed Benjamin Franklin to employ the best Parisian artists to strike

Congressional medals during the Revolutionary War. Theo. F. Rodenbaugh, *Uncle Sam's Medal of Honor* 407 (1886). The first medal struck was a silver medal for Lieutenant-Colonel Fleury, a French officer who entered the American army and led an assault in 1779 at the Battle of Stony Point. *Id.* at 407-408. With the medal, Congress thanked him for "his zeal, activity, military genius and gallantry." *Id.* at 408. Other special congressional medals were awarded after major victories to General Horatio Gates, General Anthony Wayne, General Daniel Morgan, General Nathaniel Greer, General Henry Lee, and Captain John Paul Jones. George Lang, et al., I *Medal of Honor Recipients 1863-1994* xiii (1995) (hereinafter, Lang). Congress continued to vote special medals for generals during the War of 1812 and the Mexican-American War, a practice that continues today. *Ibid.*

B. Congress And The Armed Services Have Long Taken Steps To Safeguard The Integrity Of Military Medals And To Punish Those Who Falsely Claim Them.

1. After the Civil War, Congress took action to preserve the integrity of military medals and combat rampant fraud.

On December 21, 1861, President Abraham Lincoln signed a bill authorizing the Secretary of the Navy to prepare 200 "medals of honor" to be bestowed on "such petty officers, seamen, landsmen, and marines as shall distinguish themselves by gallantry in action and other seamanlike qualities during the [Civil War]." Act of Dec. 21, 1861, ch. 1, § 7, 12 Stat. 329, 330. President Lincoln subsequently authorized promotion, a gratuity of $100, and a Medal of Honor for all seamen who distinguished "themselves in battle, or by extraordinary heroism in the line of their profession." Act of July 16, 1862, ch. 183, § 10, 12 Stat. 538, 584. President Lincoln also authorized

Medals of Honor for Army personnel "as shall most distinguish themselves by their gallantry in action, and other soldier-like qualities, during the present insurrection." Act of July 12, 1862, Res. No. 52, 12 Stat. 623. The War Department proceeded to award 1,520 Medals of Honor for actions taken during the Civil War. Larry Smith, *Beyond Glory: Medal of Honor Heroes in Their Own Words* xiii (2003) (hereinafter, *Beyond Glory*).

The public held Civil War heroes in the highest esteem. Senate Comm. on Veterans' Affairs, 93d Cong., 1st Sess., *Medal of Honor Recipients 1861-1973* 4-5 (1973) (hereinafter, *Medal of Honor Report*). On April 23, 1890, Congress created the Medal of Honor Legion, which was dedicated to the Medal and its recipients. *Id.* at 5. The Medal of Honor Legion would later become the Legion of Valor of the United States of America. *Ibid.*

Unfortunately, the popularity of the Medal of Honor led to the appearance of imitation medals. J. Worth Carnahan, *Manual of the Civil War and Key to the Grand Army of the Republic and Kindred Societies* 66–68 (1897). Worse, false claims of valor became commonplace. Notable offenders included William McGee and Theodore Goldin, who misrepresented their war records in order to obtain Medals of Honor and undeserved public acclaim. Thomas Fox, *Drummer Boy Willie McGee, Civil War Hero and Fraud* (2008) (hereinafter, *Willie McGee*); Larry Sklenar, *Theodore W. Goldin: Little Big Horn Survivor and Winner of the Medal of Honor*, 80 Wis. Mag. Hist. 106, 119-123 (1996-1997).[3]

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[3] Ironically, fraud was so rampant at this time that another would-be hero pretended to be McGee for years. See *Willie McGee*, *supra*, at 204-205. Much like Alvarez, McGee's misdeeds were not limited to fraudulently procuring a Medal of Honor. McGee also claimed to be the sole survivor of Custer's Last Stand, gaining him a second, short-lived burst of notoriety and a mitigating factor at a criminal sentenc-

In response to abuses like these, Congress and the armed services took action to limit fraud and "protect the dignity of the original medal." *Medal of Honor Report*, *supra*, at 4. In 1869, the military began releasing lists of Medal of Honor recipients for private publication. *Id.* at 5. Just before World War I, Congress created an official "Medal of Honor Roll." *Id.* at 8-9. Following World War II, the United States Army and Navy also began publishing books listing Medal of Honor recipients in their respective services. *Id.* at 5. And in 1968 and 1973, the Senate published updated lists of all Medal of Honor recipients, as well as a history of the laws governing the Medal of Honor—a 1,200-page publication. *Id.* at v.

Congress and the War Department also made substantial efforts to refine the criteria and processes for awarding military decorations to ensure that decorations retained prestige and were not given to the undeserving. In 1876, the War Department moved away from the informality that attended early awards of medals and appointed a review board to evaluate all applications for Medals of Honor stemming from the Battle of the Little Bighorn. Allen Mikaelian, *Medal of Honor: Profiles of America's Military Heroes from the Civil War to the Present* xx (2002) (hereinafter, *Profiles*). This *ad hoc* board heightened the criteria for medals by requiring "conspicuous acts of gallantry," a higher standard than mere good conduct or success in battle. Congressional Medal of Honor Society, History, http://www.cmohs.org/medal-history.php (last visited Dec. 7, 2011) (hereinafter, CMOHS History). The board

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ing for manslaughter. *Id.* at 5, 208-210, 217-218. McGee was one of approximately 300 men who falsely claimed to be the sole survivor of Custer's Last Stand. See Michael L. Nunnally, *Sole Survivor: Frauds, Imposters and the Battle of the Little Bighorn*, 21 Res. Rev., J. Little Big Horn Assocs. 25 (2007).

also established that the Medal of Honor would be awarded for individual accomplishment and not on a group-wide basis. *Profiles*, *supra*, at xx.

In 1897, the War Department barred soldiers from applying for medals to recognize their own accomplishments—a practice that had been a chronic source of fraud. *Medal of Honor Report*, *supra*, at 1125. The War Department also began requiring Medal of Honor recommendations to include specific eyewitness descriptions of the meritorious action, as well as "official reports of the action, record of events, muster rolles, and returns, and descriptive lists." *Ibid.* This reduced the number of recommendations, and "subsequent citations became longer and more complete." *Above and Beyond: A History of the Medal of Honor from the Civil War to Vietnam* 122 (Boston Pub. Co. ed., 1985).

That same year, the War Department began controlling the manufacture of Medals of Honor much more closely. For example, when the War Department ordered new ribbons for the Medal of Honor from Tiffany & Company, it warned the company against their unauthorized sale. *Medal of Honor Report*, *supra*, at 1125.

2. Congress further reformed the criteria for military medals during World War I.

In 1916, Congress passed legislation strengthening the criteria for the Medal of Honor and requiring that all Medals of Honor be earned by action involving actual conflict with an enemy, distinguished by conspicuous gallantry or intrepidity, at the risk of life, above and beyond the call of duty. Act of Apr. 27, 1916, ch. 88, 39 Stat. 53; *Medal of Honor Report*, *supra*, at 8-9. Congress also empowered a board of retired generals to review all previously awarded Medals of Honor and to rescind those medals "issued for any cause other than distinguished conduct * * * involving actual conflict with an enemy."

Act of June 3, 1916, ch. 134, § 122, 39 Stat. 166, 214. Importantly, the Act made it a misdemeanor offense for anyone to wear or publicly display a Medal rescinded by the board. *Ibid.*[4]

In 1918, Congress created the "Pyramid of Honor." Act of July 9, 1918, ch. 143, 40 Stat. 845, 870-873. The Pyramid recognized the supremacy of the Medal of Honor and arranged other military medals in a hierarchy below the Medal of Honor. The statutes creating the medals of the Pyramid of Honor, as amended, are the basis for today's military decorations, including the Medal of Honor, 10 U.S.C. § 3741 (Army); *id.* § 6241 (Navy and Marine Corps); *id.* § 8741 (Air Force), the Distinguished-Service Cross, *id.* § 3742 (Army), the Air Force Cross, *id.* § 8742, the Navy Cross, *id.* § 6242, the Silver Star, *id.* § 3746 (Army); *id.* § 6244 (Navy and Marine Corp.); *id.* § 8746 (Air Force), the Distinguished Flying Cross, *id.* § 3749 (Army); *id.* § 6245 (Navy and Marine Corps); *id.* § 8749 (Air Force), Service Medals, *id.* § 3751 (Army); *id.* § 8751 (Air Force), the Legion of Merit, *id.* § 1121, the Purple Heart, *id.* § 1129, and the Prisoner-of-War Medal, *id.* § 1128. Each statute sets forth specific criteria that must be satisfied before the relevant medal or decoration may be conferred.

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[4] On February 15, 1917, the Army Medal of Honor Board struck 911 names from the Medal of Honor Roll, including six civilians, the 29 members of President Lincoln's funeral guard, and the entire 27th Maine Volunteer Infantry Regiment, who had been offered Medals of Honor in return for extending their enlistments by four days to guard Washington, D.C. while the Battle of Gettysburg raged. *Medal of Honor Report*, *supra*, at v, 9-10; Lang, *supra*, at xv, xvii. The problematic award of Medals to the 27th Maine had been compounded by a clerical error awarding Medals even to those members of the regiment who had refused to defend Washington; this scandal caused society to condemn the regiment's members whenever they tried to wear their Medals. John J. Pullen, *A Shower of Stars: The Medal of Honor and the 27th Maine* 128-130, 140-144 (1996).

3. For nearly a century, federal law has prohibited wearing unauthorized military medals.

After World War I, Congress again faced the problem of ensuring that the Medal of Honor and other service medals were not counterfeited or fraudulently claimed. When the Medal of Honor's patent expired on November 21, 1918, its design became "subject to public use." H. Rep. No. 1484, 67th Cong., 4th Sess. 1 (1923). The Secretary of War and the Judge Advocate General of the Army were thus anxious to "block [all] avenues [of unauthorized reproduction] that lead inevitably to cheapening the decorations in question." *Ibid.* They declared: "[i]f the decorations of honor and the service medals awarded by the War Department are to continue to serve the high purpose for which they are intended, they are worthy of being protected." *Id.* at 2.

Accordingly, Congress enacted legislation prohibiting wearing, manufacturing, or selling an unauthorized military medal or badge. Act of Feb. 24, 1923, Pub. L. No. 67-438, 42 Stat. 1286. The legislation provided that "the wearing, manufacture, or sale of the congressional medal of honor, distinguished service cross, distinguished service medal, or any of the service medals or badges awarded by the War Department, or the ribbon, button, or rosette thereof * * * is prohibited, except when authorized under such regulations as the Secretary of War may prescribe." *Ibid.* Offenders were subject to punishment with a fine of up to $250 and imprisonment not to exceed six months. *Ibid.*

Congress later amended the statute to name additional medals, including the Distinguished Flying Cross. Act of Apr. 21, 1928, ch. 392, 45 Stat. 437. Congress amended the statute in 1948 to cover the Navy's decorations and medals, Act of June 25, 1948, ch. 645, 62 Stat. 732, and amended it again in 1949, to cover all service

decorations of every branch of the Armed Forces, Act of May 24, 1949, ch. 139, § 16, 63 Stat. 489, 492. Concerned about lax enforcement of laws prohibiting fraudulent wearing of the Medal of Honor, in 1994 Congress increased the penalties for selling or wearing an unauthorized Medal of Honor. Act of Sept. 13, 1994, Pub. L. No. 103-322, § 320109, 108 Stat. 1796, 2113.[5]

In 1998, the Department of the Army issued a final rule revising its policy "governing the manufacture, sale, reproduction, possession, and wearing of military decorations." Manufacture, Sale, Wear, Commercial Use and Quality Control of Heraldic Items, 63 Fed. Reg. 27208, 27208 (May 18, 1998). The rule created 32 C.F.R. § 507.12(a), which provides: "The wearing of any decoration, service medal, badge, service ribbon, lapel button, or insignia prescribed or authorized by the Department of the Army and the Department of the Air Force by any person not properly authorized to wear such device, or the use of any [such device] to misrepresent the identification or status of the person by whom such is worn is prohibited." The rule also promulgated 32 C.F.R. § 507.12(b), which provides: "Mere possession by a person of [decorations, service medals, and ribbons, except for the Medal of Honor] is authorized provided that such possession is not used to defraud or misrepresent the identification or status of the individual concerned."

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[5] The 1994 law was a response to the efforts of retired Medal of Honor recipient Mitchell Paige, who tracked people falsely claiming to have received the Medal of Honor. Gregg Zoroya, *Frauds Put Up A Decorated Front Hero: Mail-Order Medals Let Phonies Play Hero*, USA Today, June 21, 2006, at 3A. Due in part to Paige's efforts, H.L.I. Lordship Industries, a government contractor manufacturing Medals of Honor, was punished for illegally selling 300 medals. *Ibid.*

II. The Stolen Valor Act Advances Congress's Legitimate Goal Of Fighting Contemporary Medals Fraud.

A. The Stolen Valor Act Updates The Historic Prohibition On Medals Fraud By Barring False Written Or Verbal Claims To Medals.

The Stolen Valor Act is a continuation of Congress's long-running effort to preserve the integrity of military honors and combat fraudulent claims to those awards. Records of floor debate reveal that Congress considered the Act a successor to earlier laws against false claims of valor, including Washington's Revolutionary War orders. 152 Cong. Rec. H8819-01 (daily ed. Dec. 6, 2006). The Act was passed by unanimous consent in the Senate and by a voice vote in the House, following well-documented reports of extensive medals fraud. *Ibid.* Congress found that widespread fraudulent claims to medals "damage the reputation and meaning of such decorations and medals," that "[f]ederal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations" and medals, and that legislative action was needed "to permit law enforcement officers to protect the reputation and meaning of military decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006), codified at 18 U.S.C. § 704(b).[6]

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[6] Following passage of the Stolen Valor Act, a number of states enacted laws prohibiting false claims to military honors. Like the Stolen Valor Act, these state laws punish those who misrepresent, orally or in writing, that they have been awarded military medals or decorations. *E.g.*, Conn. Gen. Stat. § 53-378 (2007); Tenn. Code Ann. § 58-1-118 (2009); Utah Code Ann. § 76-9-706 (2008); Mo. Ann. Stat. § 578.510(3) (2007); 720 Ill. Comp. Stat. 5/17-2(e) (2011). Other state laws add an express "intent to defraud" requirement to the proscription against falsely representing the award of a medal or decoration. *E.g.*, Cal. Penal Code § 532b (2010); Ky. Rev. Stat. Ann. § 434.444(1)(a) (2008); Iowa Code § 718B.1 (2011); Okla. Stat. tit. 72,

The Stolen Valor Act forms a necessary bulwark against the modern problem of medals fraud. Unlike prior statutes, which targeted imposters who physically wore unearned medals, the Stolen Valor Act enables law enforcement officials to prosecute those who make false oral and written claims to medals. While those claims serve the same purpose and had the same pernicious effect as falsely donning medals—a form of symbolic speech—law enforcement was powerless to prosecute those who kept their phony medals hidden from view.

B. The Stolen Valor Act Addresses The Current, Well-Documented, And Widespread Problem Of False Claims To Military Honors.

The namesake for the Stolen Valor Act is B.G. Burkett and Glenna Whitley's award-winning book, *Stolen Valor: How the Vietnam Generation was Robbed of Its Heroes and History* (1998) (hereinafter, *Stolen Valor*). Burkett and Whitley described more than 1,700 people who falsified or exaggerated their military service. Burkett, now a consultant on military fraud for various federal law enforcement agencies, exposed for the first time "the largely unknown fact that the Fake Warrior phenomenon is real, it is pernicious, it is widespread, and that imposters come from every imaginable strata of our contemporary society." Henry Mark Holzer & Erika Holzer, *Fake Warriors: Identifying, Exposing, and Punishing Those Who Falsify Their Military Service* 8, 15-25 (2003) (hereinafter, *Fake Warriors*); Benjamin Alexander-Bloch, *Groom Gets Feds to Snap to Attention: Fake Navy Uniform Worn at Wedding*, New Orleans Times-Picayune, Oct. 2, 2008, at 1.

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§ 6-1 (2005). Some of the laws, like the Stolen Valor Act, levy increased penalties if the perpetrator has laid false claim to certain highly valued medals. *E.g.*, Mo. Ann. Stat. § 578.510(3); Tenn. Code Ann. § 58-1-118(b)(2)(c).

Investigators estimate that there are tens of thousands of imposters. *Bogus U.S. Medals*, *supra*, at A1; *Fake Warriors*, *supra*, at 5. Mike Sanborn, a former Marine and an FBI agent who investigates violations of the Stolen Valor Act, described fraudulent claims to military medals as "rampant." John Crewdson, *False Courage: Claims for Top Military Honors Don't Hold Up*, Chi. Trib., Oct. 26, 2008, at 1 (hereinafter, *False Courage*). Mark Bowden, author of *Black Hawk Down*, a best-selling book about the 1993 U.S. Army Ranger engagement in Somalia, termed the number of false claims to military medals as "mind-boggling," causing him to "doubt[] anyone who tells me a war story." Mike Hudson, *Real War Veterans Increasingly Uncover Truths of 'Wannabes,'* Roanoke Times, Nov. 16, 2003, at A4 (hereinafter, Hudson).

Investigative journalists have uncovered staggering amounts of medals fraud. In 2008, the Chicago Tribune investigated every biography in *Who's Who* that listed a military medal. *False Courage*, *supra*, at 1. Over one-third of the 333 people who claimed a medal had not received one. *Ibid.* "The men whose obituaries or profiles in *Who's Who* make these claims are mainly individuals of note and accomplishment: lawyers, physicians, clergymen, CEOs, business executives, company presidents, university professors, career military officers, teachers, policemen, elected officials, even a psychiatrist." *Ibid.* The same investigation found that over 80% of 273 recent obituaries had inaccurately attributed military decorations to the deceased. *Ibid.* "The Tribune also found bogus decorations, including at least two Medals of Honor, engraved on headstones in military cemeteries across the country." *Ibid.* It uncovered a total of 84 Medals of Honor, 119 Distinguished-Service Crosses, 99 Navy Crosses, five Air Force Crosses and 96 Silver Stars, all bogus. *Ibid.*

The Chicago Tribune investigation is one of many reports detailing the widespread problem of medals fraud. Other reports have uncovered false claims to military medals by a broad cross-section of people, including the former mayor of Atlantic City, the former director of veterans programs for New Jersey, an elected Massachusetts tribal leader, a county Commissioner of Revenue, a senior ROTC instructor, a policeman, judges, a Transportation Security Administration baggage handler, a prominent speechwriter and press secretary for a presidential candidate, a consultant to the Fox News Channel on the war in Afghanistan, the first vice president of the Dallas-area NAACP, an ordained Episcopal priest, a business executive contracting with a major company, a Pittsburgh oil man, a financier, a Marine judge advocate, a civilian lawyer, a real estate agent, a general contractor, a private investigator and would-be hit man, the president of an elite airborne division association, a director of a Youth Challenge Program, nurses, a nursing home volunteer, a saloonkeeper and commander of a veterans color guard, and an elderly woman described as a "sweet little old lady." *Stolen Valor*, *supra*, at 183-186; *Fake Warriors*, *supra*, at 16-21; George Brennan, *Cape Cod, Mass.-Area Tribal Chairman Steps Down Amid Scandal*, Cape Cod Times, Aug. 25, 2007; Daniel Monteverde, *False Heroes Hide Behind Honor Plates*, Dall. Morning News, Aug. 23, 2008, at 1A (hereinafter, *False Honor Plates*); *Bogus U.S. Medals*, *supra*, at A1; Alex Kuffner, *Fake Medal Tarnishes a Heroic Past*, Providence J. Bull., July 24, 2003, at 1; Adrienne Lu, *Ex-N.J. Veterans Director Lied About War Record*, Phila. Inquirer, Dec. 7, 2008, at B01; U.S. Attorney's Office, W.D. Va., Press Release, Former Dickenson County Commissioner of Revenue Sentenced on Defrauding Department of Veterans Affairs and Lying About Military Service (July 12, 2011),

http://www.justice.gov/usao/vaw/news/2011/robbins_12jul2011.html (last visited Dec. 7, 2011).

C. Criminal Penalties Are Necessary To Deter And Punish False Claims To Military Medals.

Prior to 2005, federal law barred only the wearing of an unauthorized military medal or decoration. There was no prohibition on false oral or written claims to medals. This loophole was frequently exploited. Those who wished to fraudulently represent themselves as medal recipients could avoid prosecution simply by claiming to have won medals without actually wearing them. Few want to challenge those who claim to be medal recipients by demanding that they produce the medal or decoration in question. And imposters frequently copy details for their stories from reports of real medal recipients, further complicating detection. *Stolen Valor*, *supra*, at 519-521. Even when grounds for doubt exist, "[m]edals fraud succeeds because skeptics are usually too polite to challenge liars." *Id.* at 359.

The public's lack of ready access to information also facilitates false claims to military decorations. Verifying a military record often involves Freedom of Information Act requests, time, and diligence. Recent efforts to consolidate information about medal recipients have failed. In 2009, the Department of Defense completed a congressionally requested report on whether it would be possible to create a public database of all recipients of military medals. The Department of Defense concluded that such a database, while laudable, would not reduce fraud because the Privacy Act precluded publishing the personally identifiable information necessary to verify military awards. Office of the Under-Sec'y of Def., Dep't of Def., Report to the Senate and House Armed Service Committees on a Searchable Military Valor Decorations Database (March 2009).

When challenged and asked to produce evidence of their claims, imposters frequently explain away the lack of documentation for their awards, often by citing an accident or natural disaster, or by claiming that their medals were awarded for secret, or "black," operations that are still highly classified—at once making their purported service seem dangerous and immunizing it from scrutiny. *Stolen Valor*, *supra*, at 189-190, 490; Megha Satyanarayana, *Another Accused of Faking Medals*, Sun Herald, Apr. 2, 2008, at A7. If necessary to substantiate a false claim, imposters can easily (and, in most cases, legally) purchase military decorations online from collectors. *False Courage*, *supra*, at 1; Lisa Hoffman, *Phony Iraq Warriors Marching Up: Fakes Seen as Losers Trying to Boost Image*, Memphis Com. Appeal, Mar. 27, 2005, at A11.

Many imposters continue lying even after being exposed. Some rebuild their fake persona in new communities, or assume a new false identity. One well known imposter, Rick Glen Strandlof, was charged under the Stolen Valor Act for masquerading as a decorated Iraq War veteran named "Rick Duncan," and later resurfaced as ex-Marine and Iraq War veteran "Rick Gold" after the charges were dismissed on First Amendment grounds. Kevin Simpson, *Man Unmasked as Fake Military Hero in Springs Reappears as "Lawyer" in the Highlands*, Denver Post, July 24, 2011, at B01. Watchdog groups readily admit that they are unable to keep up with the seemingly endless number of imposters. Stella M. Chavez, *'Hero' Pleads Guilty to Lies About War Honors*, Dall. Morning News, August 11, 2007, at 1B.

Congressional action was necessary to deter and punish such persistent and evasive fraudsters.

D. Fraudulent Claims Of Military Medals Distort Military History And Harm Soldiers And Veterans.

1. Medals fraud perverts historical accounts of wartime events.

Persons who have fraudulently claimed medals have been responsible for an untold number of distortions of American history. Their imagined representations of various conflicts have displaced true accounts and introduced uninformed, sensational exploits into books, television, and movies. As a result, inaccurate wartime accounts exist in countless newspapers, magazines, books, photographs, and documentaries, many of which are available in libraries across the country for generations to come.

Imposters fraudulently claiming medals have foisted fictional accounts of wartime events on Hollywood producers, New York Times journalists, respected book publishers, historians, authors, government officials, and veterans' groups. *Stolen Valor*, *supra*, at 385-434, 457-461, 503-506, 516-523, 584-587. One man, while incarcerated for the brutal murder of a hitchhiker, convinced a major publisher to release his memoir, complete with papers for his phony medals. *Id.* at 418-420. Another imposter became a guest history lecturer at the University of California. *Id.* at 431-433. One attorney's award-winning memoir, published through an academic press, recounted an entirely fictional tale of how he received a Silver Star for actions taken in Vietnam. Patty Henetz, *S. L. Man's Military Memoir Questioned*, Deseret Morning News, Apr. 18, 2004, at B03.

Shelby Stanton, one of the best-known Vietnam War historians, boasted of receiving numerous valor awards while serving as a Green Beret in Vietnam. *Stolen Valor*, *supra*, at 435-437. He was a distinguished lecturer, edi-

tor, and academic fellow, as well as the author of the U.S. Department of Defense's analysis of Agent Orange exposure. *Id.* at 435. Research by *Stolen Valor* author B.G. Burkett revealed that Stanton had never served in Vietnam, and that nearly all of his claims to medals were fraudulent. *Id.* at 437-438. In fact, Stanton had stolen, plagiarized, destroyed, and fabricated hundreds of documents for his books, often misrepresenting the facts of the Vietnam War in the process. *Id.* at 438-443. Nevertheless, even after Stanton's exposure, his publisher continued to sell his latest book, and the U.S. Attorney's office decided his prosecution was not a priority. *Id.* at 442-443.

Even the Library of Congress has fallen prey to medals fraud. At one time, the Library of Congress's oral history project website listed 24 phony Medals of Honor, 47 nonexistent service crosses, and 45 invented prisoner-of-war claims. *Half of MOH Entries in Library of Congress Project are Incorrect*, Army Times, Oct. 1, 2007, at 18.

2. Medals fraud exacts a substantial toll on society in general.

Imposters who pose as medal recipients frequently do so to obtain social and economic benefits. Someone who successfully pretends to be a wounded combat veteran can obtain a 100% disability rating, worth more than $35,000 a year in tax-free VA benefits, plus Social Security disability payments, full health coverage and educational benefits for himself and his family. Allen G. Breed, *POW Benefits Being Taken by Non-Deserving*, Deseret Morning News, Apr. 12, 2009, at A10. One investigation revealed that false claims of military medals enabled twelve men alone to defraud the U.S. Department of Veterans Affairs out of more than $1.4 million in veteran's benefits. U.S. Attorney's Office, W.D. Wa., Press Release, Northwest Crackdown on Fake Veterans in "Op-

eration Stolen Valor": Phony Vets Scam more than $1.4 Million and Damage Image of Honorable Veterans, (Sept. 21, 2007), available at http://www.justice.gov/usao/waw/press/2007/sep/operationstolenvalor.html (last visited Dec. 7, 2011) (hereinafter, *Phony Vets*).

Imposters can also obtain other benefits, including tax breaks, free special license tags, free hunting and fishing licenses, military funerals, and grave markers. *Fake Warriors*, *supra*, at 42-45; *Bogus U.S. Medals*, *supra*, at A1; *False Honor Plates*, *supra*, at 1A. In 2003 in Virginia, 642 people claimed on their tax forms that they received the Medal of Honor, which exempts military retirement income from state taxes. But at the time there were "only four living recipients in Virginia and 132 in the country." *Bogus U.S. Medals*, *supra*, at A1.

Imposters have appropriated a variety of intangible benefits, such as media attention, *Stolen Valor*, *supra*, at 477-480, invitations to lead parades, Russell Working, *Veteran Fraud Cases on the Rise*, Chi. Trib., Oct. 8, 2007, at 1, and invitations to preside over weddings, funerals, and baptisms, *Phony Vets*, *supra*. In 2008, a Marine sergeant faked post-traumatic stress and bluffed his way into the National Naval Medical Center in Bethesda, Maryland. Once there, he "wore unauthorized medals and accepted VIP invitations to rock concerts, major-league baseball games, banquets and other events meant to fete wounded warriors." David Dishneau, *Man Charged With Faking War Wounds*, Charleston Daily Mail, Sept. 22, 2009, at 8A.

Numerous veterans' groups have been misled into accepting imposters as members, speakers, and even leaders. *Stolen Valor*, *supra*, at 502-506, 516-519. Rick Glen Strandlof, who posed as a war hero and recipient of the Purple Heart and Silver Star, employed his deceptions to found a veterans' group and campaign for candidates for

political office. Dan Frosch, *A Leader of Veterans is Exposed as a Fraud*, N.Y. Times, May 15, 2009, at A14.

3. Medals fraud dishonors America's true heroes.

Over 55% of the Medals of Honor awarded between World War I and 2005 have been posthumous. Edward F. Murphy, *Vietnam Medal of Honor Heroes* 5 (2005). "During the Korean and Vietnam Wars nearly 70 percent were posthumous." *Ibid.* For this reason, "[t]hose who hold the Medal of Honor do not like to be called 'winners.' They feel that the actions for which they have been recognized have nothing to do with anything that might be interpreted as a contest. Therefore, they are 'recipients' to whom the Medal has been awarded." *Beyond Glory*, *supra*, at xv.

Medal of Honor recipient Mitchell Paige, who has exposed more than 500 different military imposters, embodied that ethos of sacrifice and duty. *Beyond Glory*, *supra*, at 17. When asked about his exploits, he observed: "I always mention the fact that this [honor] doesn't belong to me. It belongs to thirty-three other guys, too. * * * I don't know how else to tell it, because, after all, they were there and fought with me, but they didn't get anything but Purple Hearts. And half of them died. The last thing I ever thought about was a medal." *Id.* at 18.

Those who cheaply and casually lay claim to honor reserved for brave warriors dishonor the courage and sacrifice of those who have received the Medal of Honor, the Purple Heart, and other military decorations. For true heroes and recipients, "it's akin to a slap across the face when false heroes take credit—and receive benefits—for actions they never performed." *False Honor Plates*, *supra*, at 1A. Our nation's finest soldiers now must endure skepticism about their valor, rather than enjoying the

unalloyed thanks of a grateful nation. See Hudson, *supra*, at A4.

As the largest U.S. veterans service organization, the American Legion unequivocally states that medals fraud harms veterans. It creates suspicion of valid award recipients and it dilutes the precious and hard-won recognition that should rightly be accorded only to those who went above and beyond the call of duty. Cf. *Purcell* v. *Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam) (reasoning that voter fraud "debas[es]" and "dilut[es]" the votes of qualified voters, making them "feel disenfranchised").

III. The First Amendment Does Not Protect False Claims Of Military Valor.

The Stolen Valor Act penalizes anyone who "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States[.]" 18 U.S.C. § 704(b). The Act proscribes a type of speech—false statements of fact—that, taken alone, is not entitled to protection under the Free Speech Clause of the First Amendment. Moreover, the Act prohibits a specific type of false statement of fact—fraudulent claims to military medals—that historically has been prohibited. The Stolen Valor Act carefully targets that highly disfavored subset of unprotected fraudulent speech without any risk to high-value political, religious, or other "speech that matters."

The court of appeals erroneously concluded that the Stolen Valor Act must be evaluated using strict scrutiny because it "does not fit neatly into any of those 'well-defined' and 'narrowly limited' classes of speech previously considered unprotected" by the First Amendment *United States* v. *Alvarez*, 617 F.3d 1198, 1214 (9th Cir. 2010). The court of appeals grounded that conclusion on its determination that "false factual speech, as a general

category unto itself," is not among the "historical and traditional categories" of speech that merit no First Amendment protection. *Id.* at 1206. Rather, according to the court of appeals, the "historical and traditional categories of unprotected false factual speech have thus far included only certain *subsets* of false factual statements," such as defamation and fraud. *Id.* at 1213.

The court of appeals ignored that fraudulent claims to military medals and decorations have been condemned throughout American history and have been sanctioned in various forms since Washington issued his injunction against them in 1782. The universal opprobrium reserved for false claims of valor arises from the recognition that such claims inflict incalculable harm on members of the military and veterans, their family members, and the nation as a whole. The prohibition of such claims mitigates that harm while posing no threat to high value speech on matters of public concern. The court of appeals' ruling should be reversed.

A. False Claims Of Military Valor Have Been Historically Condemned And Fall Within A Well-Defined Category Of Speech—False Statements Of Fact—That Lacks First Amendment Protection.

The Stolen Valor Act is an important part of the military honors system. It advances the longstanding Congressional objective of safeguarding military decorations against dilution by deterring and punishing those who would falsely claim them. In so doing, the Act prohibits a specific type of speech—knowingly false claims to have been awarded a military medal—that has been subject to various forms of regulation and prohibition for over two centuries. The speech barred by the Stolen Valor Act merits no First Amendment protection.

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 (1942). "'From 1791 to the present' * * * the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never include[d] a freedom to disregard these traditional limitations.'" *United States* v. *Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382-383 (1992)). Content-based regulations of speech that fall within these limited and historically-recognized areas are not subject to strict scrutiny.

The Court has consistently characterized false statements of fact as a category of speech that, as a general matter, merits no First Amendment protection. See *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless."); *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("[T]here is no constitutional value in false statements of fact."); *Time, Inc.* v. *Hill*, 385 U.S. 374, 390 (1967) ("'[T]he knowingly false statement and the statement made with reckless disregard of the truth do not enjoy constitutional protection.'" (quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964))).

Permissible prohibitions on false statements of fact address specific types of falsehoods that are traditionally recognized as having no constitutional value. See, *e.g.*, *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003) (fraud); *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 760–761 (1985)

(defamation); *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565-566 (1980) (false and misleading commercial speech); *Time*, 385 U.S. at 388–390 (1967) (false light invasion of privacy); *Konigsberg* v. *State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961) (perjury). Similarly, several federal statutes punish specific types of false factual statements. See Brief of the United States at 29–33. The Court has observed that "it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *United States* v. *Ferber*, 458 U.S. 747, 763-764 (1982).

While holding that certain types of historically-sanctioned speech fall outside the ambit of First Amendment protection, the Court has rejected the notion that Congress has a "free-floating" power to prohibit speech based on a "'categorical balancing of the value of the speech against its societal costs.'" *Stevens*, 130 S. Ct. at 1585. Accordingly, this Court has cautioned against "recognizing new categories of unprotected speech" based on legislative conclusions that "certain speech is too harmful to be tolerated." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011). Instead, First Amendment protection should be found lacking only upon "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Ibid.*

Both *Stevens* and *Brown* addressed statutes placing "novel restriction[s] on [the] content" of speech. Neither depictions of animal cruelty nor violent images had historically been treated as unprotected speech. Rather, the statutes that were invalidated were truly *sui generis*

prohibitions on speech that lacked any "historical warrant" for their existence. See *Brown*, 131 S. Ct. at 2734.

Unlike laws prohibiting depictions of animal cruelty and regulating violent video games, the Stolen Valor Act easily satisfies the test of history and tradition articulated in *Brown* and *Stevens*. Much like laws against fraud, defamation, and false commercial speech, the Stolen Valor Act targets a narrow subset of false factual speech that has long been subject to varying forms of government regulation.[7] Beginning with General Washington and continuing through the present day, the United States government has sought to preserve the value of military decorations (and the honor system of which they are a critical component) by punishing those who possess the "insolence to [falsely] assume the badges of them." *General Orders*, *supra*, at 34.

For nearly 90 years, federal law has subjected to criminal penalty those who knowingly wear a military medal without authorization and for the purpose of misrepresenting their status. See 18 U.S.C. § 704(a); 32 C.F.R. § 507.12(a); *supra*, at Pt. I.B.3. The prohibition has been expanded and refined by Congress on multiple occasions, all without generating a judicial ruling that the prohibition trampled on First Amendment freedoms. See *supra*, at Pt. I.B.3. This Court has recognized that items worn on one's person may constitute speech protected by the First Amendment. *E.g.*, *Tinker* v. *Des*

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[7] Judge Kozinski's parade of horribles described in his opinion concurring in the denial of rehearing *en banc* invokes the types of "white lies" that, in his view, are a necessary component of daily living. See *United States* v. *Alvarez*, 638 F.3d 666, 674–675 (9th Cir. 2011). Of course, assuming that they could even be characterized as false statements of fact, the various statements that he describes (*e.g.*, "I gave at the office") have no deeply-rooted historical warrant for regulation or prohibition. Nor would their regulation advance even the most cursory governmental interest.

Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969). Wearing an unauthorized medal sends a clear, distinct message: "I performed acts of heroism that satisfy the statutory requirements for earning this medal." That false message, which has been prohibited for nearly a century, is precisely the same false message banned by the Stolen Valor Act.[8]

Those long standing prohibitions on fraudulently wearing unearned medals, in turn, grew out of an even older tradition of defending military medals against false claims and dilution. For nearly 150 years, Congress and the military have formally sought to restrict the award of military medals to the truly deserving. See *supra*, at Pt. I. And over two centuries ago, our nation's first President had no reservation about punishing those who falsely laid claim to military decorations. See *supra*, at Pt. I.A. As president of the Constitutional Convention and President of the United States when the Bill of Rights was ratified, Washington's view that medals fraud is not protected speech should be given great weight. Cf. *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) (recognizing that acts of the First Congress, "many of whose members had taken part in framing [the Constitution], is contemporaneous and weighty evidence of its true meaning" (citation omitted)).

The unbroken history of American military decorations is inseparable from efforts to deter and punish those who would fraudulently claim them. This rich tradition amply satisfies the Court's requirement in *Stevens*

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[8] The respondent has conceded by his own actions that false medals claims are properly subject to government sanction. When the Three Valleys Municipal Water District voted to censure him for his false military service claims, Alvarez, who still sat on the board, voted to censure himself. Peter Hecht, *Medal Liars Face New Sanctions*, Sacramento Bee, Dec. 27, 2007, at A3.

and *Brown* that the government provide a "historical warrant" to exclude speech from the First Amendment's protective arc.

B. The Stolen Valor Act Does Not Impinge Upon "High Value" Speech, And It Advances The Critically Important State Interest Of Preserving The Integrity Of The Military Honors System.

The Stolen Valor Act regulates only historically unprotected speech and poses no risk to high value speech, such as the advocacy of ideas or debate on matters of public interest and importance. The Act therefore affords adequate "breathing space" for "speech that matters." In addition, the Act advances the important government interest of preventing the harm caused by false claims to medals and preserving the military honors system that has been fostered by Congress and the United States Armed Services for over 200 years.

Knowingly false assertions that the speaker was awarded a military medal, taken collectively, have a significant harmful effect upon American's active duty military, veterans, military families, and the military honors system as a whole. What is more, they comprise extremely low-value speech on matters of private concern. They assert only that the individual speaker performed valorous acts sufficient to achieve recognition with a military medal. "[W]here matters of purely private concern are at issue, First Amendment protections are often less rigorous." *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1215 (2011). When speech on purely private matters is regulated, "'there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas'; and the 'threat of liability' does not pose the risk of 'a reaction of self-censorship' on matters of public import." *Id.* at 1215–1216 (quoting *Dun & Bradstreet*, 472 U.S. at 760).

Because the Stolen Valor Act regulates purely private speech that falls within a traditional category of speech unprotected by the First Amendment, it poses no risk to other forms of protected speech, such as speech "'relating to any matter of political, social, or other concern to the community.'" *Snyder*, 131 S. Ct. at 1216 (quoting *Connick* v. *Myers*, 461 U.S. 138, 146 (1983)). Unlike political, religious, or other speech concerning issues of public importance, the purely private speech that the Act regulates has no social utility or benefit. Rather, it is a form of fraudulent conduct aimed at stealing from the deep reservoir of goodwill and admiration earned by the blood and sacrifice of true American heroes. Accordingly, there is no need to cabin the reach of the Stolen Valor Act—much less invalidate it entirely—because it does not impair any constitutionally valued "speech that matters." See *Gertz*, 418 U.S. at 341. Rather, it is "carefully drawn to cover only a narrow category of speech" that the government may permissibly regulate. See *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010).

The Stolen Valor Act serves an important national interest by preventing harm to soldiers, veterans, military families, the military honors system, and society as a whole. The Act serves several salutary purposes. It deters imposters from diluting the integrity and value of military medals and decorations by making them appear more common than they truly are. It prohibits imposters from trading on false claims of valor to receive economic, reputational, and other social benefits. It safeguards the historical record, which may otherwise be compromised by imposters who are unafraid of prosecution. And, perhaps most importantly, it honors America's true war heroes by formally prohibiting false claims that unjustly tarnish their reputation by subjecting their honor to doubt. These objectives are worthy of deference as they

lie within the special competence of Congress to regulate matters touching on "military affairs." See *Rostker* v. *Goldberg*, 453 U.S. 57, 64–65 (1981).

CONCLUSION

The people of the United States, whether active duty service member, veteran, or civilian, have a strong interest in protecting the United States military's historic system of awards. Congress passed the Stolen Valor Act to combat an increasing threat posed to this system, and the benefits it conveys, by imposters who say they have received medals or decorations when they have not. Because the Stolen Valor Act is constitutional under the First Amendment, the American Legion respectfully requests that the judgment of the court of appeals be vacated and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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UNITED STATES OF AMERICA, PETITIONER,

V.

XAVIER ALVAREZ, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CONGRESSIONAL MEDAL OF HONOR FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Section 704(b) of Title 18, United States Code, makes it a crime when anyone "falsely represents himself or herself, ... verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

The question presented is whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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In the Supreme Court of the United States

No. 11-210

UNITED STATES OF AMERICA, PETITIONER,

v.

XAVIER ALVAREZ, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE
CONGRESSIONAL MEDAL OF HONOR
FOUNDATION
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Congressional Medal of Honor Foundation ("Foundation") is a 501(c)(3) nonprofit foundation formed by recipients of the Medal of Honor[2] to help fulfill the missions of the federally chartered Congressional Medal of Honor Society of the United States of America.[3]

As part of its mission, the Foundation is dedicated to perpetuating the Medal of Honor's legacy through outreach and collaborative efforts, and to promoting American values and the qualities of courage, sacrifice, and patriotism through increased awareness, education, behavior, and

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[1] This brief was not authored, in whole or in part, by counsel for a party. No person or entity other than members of *amicus* and its counsel contributed monetarily to the preparation or submission of this brief, with the lone exception of Jay & Dana Town of Huntsville, Alabama, who gifted monies to the Congressional Medal of Honor Foundation for the specific purpose of filing this brief. The parties have consented to the filing of this brief; copies of their letters of consent have been lodged with the Clerk of the Court.

[2] Since the Medal of Honor is given in the name of Congress it is commonly referred to as the "Congressional Medal of Honor." However, the Medal's name is the "Medal of Honor."

[3] 36 U.S.C. 40501. Only recipients of the Medal of Honor are eligible for membership in the Congressional Medal of Honor Society. Most of the living Medal of Honor recipients have asked to be named, in their individual capacities, as supporting this brief (see Appx. at pp. A-8 to A-10), yet this brief is not being submitted by the Congressional Medal of Honor Society, which has limited powers. 36 U.S.C. §40505.

example. In addition, the Foundation strives to ensure that the Medal of Honor and its recipients—each of whom is a national treasure—are protected from fraud and kept free from exploitation.

The Foundation is committed to supporting and defending the freedoms we enjoy as Americans. It holds sacred these values:

- ***Courage***: the indomitable courage demonstrated by the recipients of our Nation's highest military honor for valor as an ideal that should endure in all ways of life;

- ***Sacrifice***: sacrifice and service above self as principles that all citizens of a free and prosperous nation should strive for;

- ***Patriotism***: love of country and a commitment to support and defend the freedoms we enjoy as Americans;

- ***Citizenship***: our Country's destiny lies in its youth, and the Foundation is committed to helping them become worthy citizens of our country in the belief that ordinary Americans have the potential to challenge fate and change the course of history;

- ***Integrity***: the mark of a true hero is to have the moral courage to do what needs to be done because it is the right thing to do;

- ***Commitment***: the Foundation steadfastly supports the valiant men and women who serve their country in the same spirit of

> commitment and sacrifice as those who preceded them.

There are no better ambassadors to take this message to the American people than the Medal of Honor recipients.[4]

Conversely, Respondent, who is a proven fraud, is the antithesis to the values embodied in the Medal of Honor. He feigned to be one of those rare citizens whose gallantry and heroism merited an award of the Medal of Honor. He lied. With full knowledge of the falsity of his claim, he lied. His motivation was clear: he hoped to gain for himself the glory, recognition, attention, honors, accolades, and deference that the Medal carries with it and that are reserved for our Nation's true heroes. He was caught in his deceit and was convicted under the Stolen Valor Act for falsely representing that he had received the Medal of Honor. The question for the Court is whether the Free Speech Clause protects Respondent's lie.

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[4] The Appendix hereto recites—as representative examples of the awe-inspiring deeds for which the Medal has been awarded—the award citations for five recipients of the Medal of Honor. *See* Appx. A-1 to A-8. All Medal of Honor citations may be viewed at: http://www.history.army.mil/moh.html.

SUMMARY OF ARGUMENT

The Stolen Valor Act rightfully and constitutionally protects our nation's military decorations, to include the Medal of Honor, from exploitation by frauds. Congress has a need, indeed a duty, to preserve the intrinsic and intangible value of those accoutrements of faithful and gallant service.

The Court is asked to choose between two competing interests. On the one hand, Respondent Xavier Alvarez claims a First Amendment Right to tell a lie—to claim that he was awarded the Medal of Honor. On the other hand, the government has a perhaps impalpable, though undoubtedly compelling, interest in honoring our Nation's heroes and fostering esprit de corps within the military.

The court of appeals did not fully appreciate the government's interest in maintaining the integrity of its system of medals and decorations. For this reason, the Medal of Honor Foundation presents this brief to provide a more complete understanding of that compelling interest.

"The fundamental purpose of awards is to inspire emulation."[5] That concept is rooted in tradition

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[5] Kenneth W. Estes, *The Marine Officers' Guide* 303 (5th ed. 1985); *see, e.g.*, 32 C.F.R. §578.1(c) ("Award of decorations, and to a lesser degree, award of the Army Good Conduct Medal and of service medals, provide a potent incentive to greater effort, and are instrumental in building and maintaining morale.")

dating back more than 2100 years. And the concept was understood and appreciated by the Continental Congress, George Washington, and others at the time of framing our Constitution.

Today, the ability of the Medal of Honor (and other military decorations) to inspire emulation is even more important than at the time of our Nation's birth. We now have an all-volunteer military force and a civilian populace aware of an ongoing war. So our Nation, as a whole, needs to inspire volunteers to join the military. We also need to inspire troops to engage, both mentally and physically, in the rigors of training, to instill a high degree of competence, morale, esprit de corps, and military discipline—*i.e.*, "the individual or group attitude that ensures prompt obedience to orders and initiation of appropriate action in the absence of orders."[6]

The Medal of Honor will inspire heroic acts without thought of receiving a medal. The power to inspire unit and individual preparedness for every combat mission—through effective training, mental and physical preparation for combat, arrival on the battlefield, following orders, engaging in combat, acting as a cohesive unit despite chaos, and possessing a will to carry on despite certain danger

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[6] U.S. Marine Corps, *Marine Corps Values: A User's Guide for Discussion Leaders* 15-8 through 15-15 (1998) ("everything we do as Marines is designed to constantly sharpen our ability to succeed in battle. Every Marine must be committed to this goal.")

to self, and even injury and the deaths of comrades—gives value to every aspect of the military system of medals and decorations.[7]

The court of appeals, however, focused too intently on Alvarez's freedom to lie about having received the Medal of Honor. The court did not give due consideration to the government's compelling interest in preserving and maintaining the integrity of its system of military medals and decorations. Indeed, the court gave no deference whatsoever to Congress's finding that false claims to have received the Medal of Honor and other decorations "damage the reputation and meaning of such decorations and medals."

Our Nation's interest in protecting and preserving the value of its system of honors for the armed forces far outweighs whatever minimal First Amendment value may exist for the utterance of lies. False claims regarding the Medal of Honor and other military decorations are not speech that occupies any rung of protected free speech under the First Amendment. Respondent's speech—his lie—did not address matters of public concern, political discourse or social issues. He did not express an opinion. Nor

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[7] The court of appeals commented on the motivation for engaging in the "riskiest missions" (Pet. App. 39a), but that is too narrow a focus. Medal of Honor Recipient Salvatore Giunta, for example, was ambushed during a routine patrol and responded with "extraordinary heroism and selflessness above and beyond the call of duty." Appx. A-3 to A-5.

was his speech an attempt to induce societal or governmental change. Respondent's deceit was for his own personal aggrandizement.

A fraudulent claim to a Medal of Honor exploits and misappropriates the goodwill forged into the Medal by the incredible acts of heroism, and often deaths, of its recipients. There is no meritorious reason for falsely claiming to have received a Medal of Honor.

If the Court were to subject the Stolen Valor Act to strict scrutiny, the Court must conclude that the Act is narrowly tailored to achieve a compelling government interest.

FACTUAL BACKGROUND

A. Military Decorations Are Awarded to Inspire Emulation to Serve, to Maintain Discipline, to Excel, and to Endure the Hardships, and Rise to the Challenges, of Combat

> "The fundamental purpose of awards is to inspire emulation."[8]

The court of appeals recognized that "[e]specially at a time in which our nation is engaged in the longest war in its history, Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of *honoring* our military men and women for their service and, at times, their sacrifice."[9] The court, however, did not fully appreciate the purpose and value of military medals and decorations, which are not limited in purpose to honoring service or sacrifice.

The purpose behind such awards is not merely to honor brave and heroic deeds, but to inspire emulation. Public recognition for heroic acts inspires civilians to volunteer to serve in the armed forces. It inspires members of the armed forces to endure the rigors of training to instill military discipline and

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[8] Estes, *supra*, at 303.

[9] Pet. App. 37a (emphasis added).

esprit de corps. It inspires them to prepare physically and mentally for combat, to suffer the hardships of combat duty, to arrive on the battlefield. It inspires them to engage the enemy, and to be ready to act cohesively as a unit despite the danger and chaos they will encounter. It inspires most to carry on while others are falling around them. It inspires many to lead, when their leader has fallen and others have lost their steel. And it inspires many to be prepared to act with gallantry, bravery, and heroism—by trained instinct and without thought of medals—if and when they are put in a situation requiring such action.[10]

This value of military decorations has been recognized for millennia (so too has the need to restrict decorations to those who earned them). The Greek historian, Polybius (ca. 200 to 117 BC), touted the benefits of the Romans' system of honors, which encouraged "young soldiers to face danger," and led to the Romans' success and brilliance in wars:

> After a battle in which some of them have distinguished themselves, the general calls an assembly of the troops, and bringing forward those whom he considers to have displayed conspicuous valour, first of all speaks in laudatory terms of the courageous deeds of each

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[10] The five Medal of Honor citations that are reproduced in the Appendix are representative examples of the results of such inspiration. Appx. A-1 to A-8.

and of anything else in their previous conduct which deserves commendation, and afterwards distributes the following rewards. To the man who has wounded an enemy, a spear; to him who has slain and stripped an enemy, a cup if he be in the infantry and horse trappings if in the cavalry, although the gift here was originally only a spear. These gifts are not made to men who have wounded or stripped an enemy in a regular battle or at the storming of a city, but to those who during skirmishes or in similar circumstances, *when there is no necessity for engaging in single combat, have voluntarily and deliberately thrown themselves into the danger. ... By such incentives they excite to emulation and rivalry in the field not only the men who are present and listen to their words, but those who remain at home also.* For the recipients of such gifts, quite apart from becoming famous in the army and famous too for the time at their homes, are especially distinguished in religious processions after their return, *as no one is allowed to wear decorations except those on whom these honours for bravery have been conferred by the consul;* .... Considering all this attention given to the matter of punishments and rewards in the army and the importance attached to both, no wonder that the

> wars in which the Romans engage end so successfully and brilliantly.[11]

B. Our Founding Fathers Understood the Purpose and Value of Military Awards

Our Nation's independence was declared with a mutual pledge of our Founder's lives, fortunes, and sacred honor. It is much a part of the history of our great Nation that our military heroes should be honored with medals for valor and treated with a degree of respect. Indeed, in March 1776, the Continental Congress voted for the creation and presentation of our Nation's first medal—to General George Washington as recognition for his "siege and acquisition of Boston."[12]

General Washington later expressed his desire "to cherish a virtuous ambition in his soldiers, as well as to foster and encourage every species of military merit," and issued an order directing that a heart in purple cloth or silk would be worn for "singularly meritorious action" consisting of "instances of unusual gallantry, ... extraordinary fidelity, and essential service in any way." He

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[11] Polybius, *The Complete Histories of Polybius* 251 (W.R. Paton trans., Digireads.com Publishing 2009) (emphasis added); *see also* John Ross-of-Bladensberg, *On the Causes Which Have Led to the Preeminence of Nations in War*, 21 J. Royal United Svcs. Inst. 383 (photo. reprint 2011) (1877).

[12] J.F. Loubat, LL.D., *The Medallic History of the United States of America, 1776-1876*, Vol. 1, at xi, 3 (1878).

directed that "Men who have merited this last distinction to be suffered to pass all guards and sentinels which officers are permitted to do." He also directed:

> Honorary badges of distinction are to be conferred on the veteran non-commissioned officers and soldiers of the army who have served more than three years with bravery, fidelity and good conduct; ....; *should any who are not entitled to the honors, have the insolence to assume the badges of them, they shall be severely punished. On the other hand, it is expected these gallant men who are thus distinguished will, on all occasions, be treated with particular confidence and consideration.*[13]

And in 1787, Colonel David Humphreys, secretary to General Washington, praised the value of medals to "awaken a noble spirit of emulation":

> In our free republics certainly nothing should be suppressed that can tend to awaken a noble spirit of emulation, to cherish the fine feelings of patriotism, to exhibit alluring examples for

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[13] *General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783*, at 34-35 (Edward C. Boynton ed., 1883; reprint 1909) (Order dated August 7, 1782) (emphasis added).

> imitation, or to extend and perpetuate the remembrance of those heroic achievements which have ennobled the era of the American Revolution. Few inventions could be more happily calculated to diffuse the knowledge and preserve the memory of illustrious characters and splendid events than medals ....[14]

This recognition, at our Nation's birth, of the inspirational value of military decorations highlights the need to preserve and protect our system of medals.

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[14] Loubat, *supra*, XXXIV-XXXV) (letter from Colonel David Humpheys to "The Printer of the American Museum (Mr. Carey), dated Mount Vernon, November 1787").

C. The Medal of Honor Is the Highest Award for Valor and, Accordingly, Has Great Value to Our Nation

Among our Nation's medals, the Medal of Honor is distinguished as holding unsurpassable value. It is the highest award for valor in action against an enemy force that can be bestowed upon an individual serving in the armed forces. The present hierarchy of medals for valor, termed the "Pyramid of Honor", began 150 years ago, on December 21, 1861, during the presidency of Abraham Lincoln, upon enactment of the first statute authorizing a Medal of Honor.[15]

The Medal of Honor may be awarded only to a person who

> distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty
>
> (1) while engaged in an action against an enemy of the United States;
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> (2) while engaged in military operations involving conflict with an opposing foreign force; or
>
> (3) while serving with friendly foreign forces engaged in an armed conflict

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[15] Act of Dec. 21, 1861, 12 Stat. 329-330.

> against an opposing armed force in which the United States is not a belligerent party.[16]

The Medal is presented ceremoniously by the President of the United States in the name of Congress. Since its origin 150 years ago, the Medal of Honor has been awarded only 3475 times. Nearly half of those Medals resulted from actions in the Civil War. There are currently only 85 living Medal of Honor recipients: 14 from World War II; 13 from the Korean War; 55 from the Vietnam War; and 3 from the War in Afghanistan.[17] The rarity of the Medal reflects the character of its recipients and enhances its precious value: "How numerous would have been our medals if Congress had not been imbued with the conviction that only the very highest achievements are entitled to such a distinction, and that the value of a reward is enhanced by its rarity!"[18]

Medal of Honor recipients enjoy a humble yet prominent stature in their communities and ultimate recognition as heroes. The Medal commands such instant recognition, respect, and admiration, and therefore holds such inherent value,

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[16] 10 U.S.C. §§3741 (Army), 6241 (Navy and Marine Corps), 8741 (Air Force).

[17] Only three years ago there were 115 living Medal of Honor recipients. The current average age of a living recipient is 73.

[18] Loubat, *supra*, at viii (1878).

that the Medal of Honor Society has been charged, by statute, to "protect, uphold and preserve the dignity and honor" of the Medal.[19] The Foundation and the Society also share a common (and for the Society, statutory) purpose "to protect the name of the Medal ... from exploitation."[20] The statutory use of the word "exploit" evidences clearly that there is something of value that can be misappropriated to the detriment of the Medal and its recipients—*i.e.*, the recognition, respect, admiration, and status that righteously accompany the Medal of Honor.

The significance of the recipients of the Medal of Honor is evidenced by the many statutes and regulations that address the Medal. Wide ranging in nature, those laws give privileged attention and exclusive status to Medal of Honor recipients. For example, the heirs of a recipient of the Medal of Honor may be appointed by the President of the United States for enrollment at the U.S. Military Academy,[21] U.S. Naval Academy,[22] or the U.S. Air Force Academy.[23] Medal of Honor recipients are entitled to be buried in Arlington National Cemetery.[24] And an act was passed to preserve the

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19 *See* 36 U.S.C. §40502.

20 *See id.*

21 10 U.S.C. §4342(c).

22 10 U.S.C. §6954(c).

23 10 U.S.C. §9342(c).

24 32 C.F.R. §553.15(d)(1) (2010).

Battle of New Market Heights because "14 black Union soldiers were awarded the Medal of Honor in recognition of their valor during the battle [there]."[25]

The prestigious status associated with the Medal of Honor, and its power to inspire emulation, is at its peak when our Nation is at war, such as now. Moreover, in our civilian population, the values that imbue the Medal of Honor have never been in higher demand or had such a pronounced need for preservation.

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[25] 16 U.S.C. 423l-2; *see also* 16 U.S.C. § 423l-5 (directing the establishment "of a monument or memorial suitable to honor the 14 Medal of Honor recipients from the United States Colored Troops who fought in the Battle of New Market Heights.").

D. Our Military Heroes Often Live and Toil Without Fame, Thus Providing Opportunities for Imposters to Assume the Status of a Hero and to Dilute the Precious Value of the Medals

In 1945, Audie Murphy's face graced the cover of Life Magazine, and his homecoming was accompanied by much fanfare:

> First Lieutenant Audie Murphy came home last month covered with ribbons. He fought through the campaigns of Africa, Sicily, Italy and France. He got the ... [Distinguished Service Cross] for capturing an entire German garrison and the Congressional Medal of Honor for stopping a German advance singlehanded .... Altogether he had 14 medals, which made him the most decorated combat infantryman in the Army. It also made him the greatest thing that ever happened to Farmersville, Texas, his home town. When he arrived all the stores closed for a local holiday and crowds stood in the 98° heat to cheer while he made a bashful speech.[26]

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[26] *Life Visits Audie Murphy*, Life, July 16, 1945, at 94 (with cover photo of Audie Murphy, captioned "Most Decorated Soldier"). Other World War II heroes were celebrities and feted with parades. For example, in 1943, Life Magazine reported the

But not all homecomings of military heroes were so widely publicized. And certainly, the heroes of the Vietnam War, USS Liberty (1967), USS Pueblo (1968), SS Mayaguez (1975), Grenada (1983), El Salvador (1987), Panama (1989), Desert Storm (1991), Somalia (1993), Kosovo (1999), and the Global War on Terrorism (2001 to present), have not, on the main, received such individual public acclaim.[27]

Within the last thirteen months, the Medal of Honor has been awarded to three living recipients for actions in Afghanistan: Staff Sgt. Salvatore A. Giunta, Staff Sgt. Leroy A. Petry, and Sgt. Dakota Meyer. They are recognizable heroes among members of our armed forces. Among our general public, however, they perhaps enjoy less fame.[28]

That our military heroes' names are not widely known enables imposters such as Respondent Alvarez to sustain a false image as one of those few,

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homecoming parade in honor of John Basilone. *Life Goes to a Hero's Homecoming*, Life, Oct. 11, 1943, at 126. A US Navy destroyer, the USS Basilone, later was commissioned and named in his honor.

[27] *See, e.g.*, the names of Medal of Honor recipients identified in the Appendix. Appx. A-8 to A-10.

[28] Recipients of other medals for heroism—*e.g.*, the Navy Cross, Distinguished Flying Cross, and the Silver Star—are even less likely to be widely recognized among the general population. The value of those medals, too, are protected by the Stolen Valor Act.

and to enjoy the status and respect reserved for our true military heroes. This is true despite the proliferation of websites that try to name recipients of medals.

E. The Stolen Valor Act Provides Needed Deterrence to False Representations Like Alvarez's

Since the attacks of September 11, 2001, our society has placed a renewed heightened value on the status of being a veteran. Among all of the honors and decorations associated with military service the greatest value is placed on the status of being a recipient of the Medal of Honor.

Cognizant of that value, Xavier Alvarez crudely and fraudulently boasted to his elected peers and other community leaders of his conquests as, among other things, a retired United States Marine, wounded veteran, and Medal of Honor recipient, all of which were false.[29] Alvarez addressed the Three Valleys Water Board in Claremont, California, and as a newly elected member of the Board, intentionally made false statements about his "conspicuous gallantry."

Before his election to the water district board, but apparently during the campaign for election, Alvarez also "told ... [a woman] that he won the Medal of Honor for rescuing the American Ambassador during

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[29] Pet. App. 4a.

the Iranian hostage crisis."[30] He claimed that "he had been shot in the back as he returned to the embassy to save the American flag." He also claimed to be "a Vietnam veteran helicopter pilot who had been shot down but then, with the help of his buddies, was able to get the chopper back into the sky."[31] They were all lies.

His motive was clear: to appropriate to himself the status and prestige of the Medal.[32]

To Alvarez (and many others like him[33]), the perceived benefits of making such false claims outweighed the perceived risk and consequences of

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[30] Pet. App. 4a.

[31] *Id.* at 4a-5a. Respondent apparently lied about other aspects of his life, claiming that he played for the Detroit Red Wings, worked as a police officer, and was secretly married to a Mexican starlet.

[32] Pet. App. 23a (stating, "the most obvious reason people lie about receiving military honors is because they believe that their being perceived as recipients of such honors brings them acclaim ....").

[33] For example, one veteran falsely convinced a U.S. Congressman in 2000 that he had received the Distinguished Service Cross (our Nation's second-highest military award) for his actions in Vietnam. His story prompted the Congressman to hold a public award ceremony and to sponsor legislation naming a post-office after the imposter. His fraud persisted for a number of years thereafter. *See* Jim Tice, *Veteran's Medal Claim Exposed as a Scam*, Army Times, Sept. 1, 2003 (http://www.armytimes.com/legacy/new/0-ARMY PAPER-2109473.php).

getting caught. He was not deterred by the possibility that his lie might be exposed. He was not deterred by the potential for public humiliation. (Indeed, there is no indication in the record that he felt humiliated after his lies were exposed). Thus, it is no surprise that the remedy of "more speech" to bring about public humiliation (as suggested by the court of appeals) has been insufficient to deter a large number of false claims like Alvarez's.

Congress, upon finding that "[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals," passed the Stolen Valor Act.[34] Legislative action was needed because false claims dilute the meaning of, and instantaneous respect and admiration commanded by, the Medal of Honor. The Act changes the risk-reward balance to deter false claims without impinging on the freedom to express speech having value under the First Amendment.

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[34] 120 Stat. 3266 (2006).

ARGUMENT

I.
THE STOLEN VALOR ACT IS NARROWLY TAILORED TO ACHIEVE A COMPELLING GOVERNMENT INTEREST

A. The Integrity of the System of Medals and Decorations Is a Compelling Government Interest, Which the Court of Appeals Did Not Fully Comprehend

The court of appeals properly found that the government has a compelling interest in protecting the integrity of the military honors system.[35] But the court misapprehended the nature and extent of that governmental interest, thus causing the court to doubt the efficacy of the Stolen Valor Act and to reject Congress's findings regarding the need for the Act.

While accurately describing the government's interest as "noble," the court apparently believed the interest was limited to "honoring military men and women for their service and, at times, their sacrifice." This was too narrow a view, which the court used to rationalize its improper rejection of Congress's findings concerning the conspicuous harm caused by false claims to the status and value associated with the Medal of Honor.

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[35] Pet. App. 37a.

1. The Value of the Medals System Is Far More Complex than the Court of Appeals Appreciated

The court of appeals did not appreciate the value of medals to "inspire emulation." As noted above (pp. 9-12), the government's interest in protecting the awards system is strongest in the context of inspiring emulation—inspiring volunteerism, faithful service, and diligent pursuit of military training, discipline, and studies, so that each member of our armed forces may be mentally and physically ready for whatever challenges might come. The Medal of Honor, poised at the crown of the medals system, has the greatest ability to foster military discipline, morale and esprit de corps in the armed forces, and to inspire emulation.

The court of appeals, however, discounted the value of the medals system, based on the court's skepticism that the "riskiest missions" are performed in hopes of receiving a medal.[36] The court also

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[36] The court of appeals' lack of appreciation for the full value of the Medal to inspire emulation is evidenced by this statement in its opinion, which focuses solely on acts of heroism and "riskiest missions":

> Further, we agree ... that suggesting "that the battlefield heroism of our servicemen and women is motivated in any way ... by considerations of whether a medal may be awarded simply defies ... comprehension" and is "unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor

expressed doubt that "people's false claims to have received the medal has [sic] a *demotivating* impact on our men and women in uniform."[37] That superficial analysis failed to appreciate everything that the Medal *inspires*. It also was an implicit and improper rejection of Congress's express findings.

2. The Court of Appeals Improperly Rejected Congress's Findings

The court of appeals improperly rejected Congress's findings that the Stolen Valor Act was necessary to protect the government's interest at stake. False claims to the Medal and other awards make them appear less rare and less meritorious. The cumulative effect of those claims dilutes the inspirational value of the Medal and other decorations, and undermines the purposes and benefits of the military awards system. Thus, Congress made specific a finding that "[f]raudulent claims surrounding the receipt of the Medal of Honor, ... and other decorations and medals

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> Act purports to honor." ... Even if we were to make the unfounded assumption that our troops perform their riskiest missions in the hope of receiving the Medal of Honor, there is no evidence—nor any reasonable basis for assuming—that some people's false claims to have received the medal has a demotivating impact on our men and women in uniform.

Pet. App. 39a.

[37] *Id.* (emphasis added).

awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals."[38]

The court of appeals nevertheless suggested imposing a burden on the government to "prove that the defendant's speech or writing proximately caused damage to the reputation and meaning of military decorations and medals...."[39] The court also stated that "there is no readily apparent reason for assuming, without specific proof, that the reputation and meaning of military decorations is harmed every time someone lies about having received one."[40] And having only a superficial understanding of the purposes of awarding medals, the court of appeals concluded that it "seems just as likely that the reputation and meaning of such medals is wholly unaffected by those who lie about having received them."[41] Each of those statements by the court of appeals was an improper rejection of Congress's findings.

This Court has held, in the First Amendment context, that "when we face a complex problem with many hard questions and few easy answers, we do well to pay careful attention to how the other branches of Government have addressed the same

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[38] 120 Stat. 3266.

[39] Pet. App. 23a.

[40] *Id.*

[41] *Id.* 38a.

problem."[42] Given Congress's role in regulating the military—our Constitution confers upon Congress the powers "[t]o make Rules for the Government and Regulation of the land and naval Forces"; "[t]o provide for organizing, arming, and disciplining, the Militia"; and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"[43]—Congress's findings should have been afforded some degree of deference.

With minimal deference to the Congressional findings, and an appreciation of the value of our Nation's system of military awards, this Court should have no difficulty holding that the Stolen Valor Act protects a compelling government interest.

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[42] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 103 (1973).

[43] U.S. Const. art. I, § 8; *see also Houston v. Moore*, 18 U.S. 1, 12-13 (1820). The "Militia", to which the Constitution referred, "'comprised all males physically capable of acting in concert for the common defense.'" *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (quoting *United States* v. *Miller*, 307 U. S. 174, 179 (1939)).

B. The Stolen Valor Act Is Narrowly Tailored to Protect this Compelling Interest

The Stolen Valor Act unquestionably will deter false claims to have military medals and decorations, and it is narrowly tailored to achieve that goal. The Act prohibits only knowing lies to have been awarded certain, well-defined decorations and medals of the armed forces. Since it reaches no further than necessary, there is little, if any risk, that it will deter protected speech.

All are in agreement that Alvarez knowingly lied when he claimed that our President had bestowed on him the Medal of Honor. The speech for which he was prosecuted was a deliberate deception to adopt the status and associated discernable value rightfully held by a Medal of Honor recipient. Respondent was crudely exploiting the Medal, and thereby shamefully adopting for his aggrandizement everything that the Medal of Honor represents. This was not speech for the purposes of political discourse. This was not a white lie, hyperbole, an exaggeration, or an inability to tell total truths. It was misappropriation of a status and is unworthy of protection under the guise of free speech.

1. Alvarez's "Speech" and Similar False Claims Are Unprotected Speech

Of course, "the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[44] And there is no disagreement that "[d]ebate on public issues should be uninhibited, robust, and wide-open,"[45] with speech on issues of public concern and political speech occupying the "highest rung of the hierarchy of First Amendment values."[46] But not all speech is of equal First Amendment importance.[47]

There are a wide range of regulations that curb speech, such as libel, defamation, fighting words, obscenity and fraud, without offending the Constitution.[48] This Court has repeatedly recognized that false factual statements "are not protected by

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[44] *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976).

[45] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[46] *NAACP v. Claiborne Hardware* Co., 458 U.S. 886, 913 (1982).

[47] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

[48] *See* App. Br. 20-28.

the First Amendment in the same manner as truthful statements."[49]

Alvarez's objectively and knowingly false claims do not occupy any rung of Constitutional protection. His speech was not an expression of his views, a criticism of government, or other political speech. It was a harmful and knowing lie.

Nothing in the Act prohibits, or would suppress, speech concerning the worth or merits of military medals, discipline, training, or values. The Act is viewpoint neutral. It targets only a knowing, verifiable falsehood of a specific fact about the speaker and his or her interaction with the armed forces. In every instance where the Act applies, the speaker's lie would be an objective fact that would be known to the speaker. The Constitution has never valued such speech.

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[49] *Brown v. Hartlage*, 456 U.S. 45, 60, 61 (1982) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

2. The Act Creates Little, if any, Risk of Causing Self-Censorship of Protected Speech

The Court, in *New York Times v. Sullivan,* recognized that false statements have no value under our Constitution, but the Court rejected absolute liability for false statements in the press because doing so might cause self-censorship of protected speech to avoid a risk of liability.[50] Out of concern for the potential that such risk might chill free speech, the Court required a showing of actual malice before liability for defamation would arise.

The Stolen Valor Act creates no such risk of self-censorship of protected speech. This is unlike the situation involving a story in the press. An individual speaking about his or her own personal military service knows the truth. The speaker knows whether he or she truly received a medal. And the facts are objectively verifiable. There is little, if any, risk that a person would censor his or her protected, truthful speech to avoid liability.

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[50] *New York Times Co.*, 376 U.S. at 279-80.

CONCLUSION

Valor begets valor. Rewarding acts of heroism unites great generations with future generations, and inspires our future heroes. Our military system of decorations, including and most notably the Medal of Honor, exists fundamentally to inspire emulation—to inspire future great Americans to serve with pride, patriotism, and distinction. The Stolen Valor Act seeks to protect the value of those decorations simply by curtailing harmful, knowing lies.

The sacrifices of the Medal of Honor recipients, and of all of those for whom the Medal is worn, have safeguarded our individual freedoms under the Constitution, including the right to Free Speech. While the Congressional Medal of Honor Foundation abhors speech such as the desecration of the American flag and a protest at a funeral of a soldier, sailor, airman, or marine who has made the ultimate sacrifice for his or her country, the Foundation respects that the First Amendment protects such speech. However, it is unfathomable that our living heroes' uncommon valor, and the courage of every fallen hero, would shield from prosecution, under the guise of Free Speech, those who fraudulently appropriate for themselves the honors and approbation earned by the sacrifices of others. For that, our true military heroes—living and deceased—did not pledge their lives, their fortunes, or their sacred honor.

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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December 8, 2011

APPENDIX

MEDAL OF HONOR CITATION

BARFOOT, VAN T.

Rank and organization: Second Lieutenant, U.S. Army, 157th Infantry, 45th Infantry Division. *Place and date*: Near Carano, Italy, 23 May 1944. *Entered service at*: Carthage, Miss. *Birth*: Edinburg, Miss. *G.O. No.*: 79, 4 October 1944. *Citation*: For conspicuous gallantry and intrepidity at the risk of life above and beyond the call of duty on 23 May 1944, near Carano, Italy. With his platoon heavily engaged during an assault against forces well entrenched on commanding ground, 2d Lt. Barfoot (then Tech. Sgt.) moved off alone upon the enemy left flank. He crawled to the proximity of 1 machinegun nest and made a direct hit on it with a hand grenade, killing 2 and wounding 3 Germans. He continued along the German defense line to another machinegun emplacement, and with his tommygun killed 2 and captured 3 soldiers. Members of another enemy machinegun crew then abandoned their position and gave themselves up to Sgt. Barfoot. Leaving the prisoners for his support squad to pick up, he proceeded to mop up positions in the immediate area, capturing more prisoners and bringing his total count to 17. Later that day, after he had reorganized his men and consolidated the newly captured ground, the enemy launched a fierce armored counterattack directly at his platoon positions. Securing a bazooka, Sgt. Barfoot took up an exposed position directly in front of 3 advancing Mark VI tanks. From a distance of 75 yards his first shot destroyed the track of the leading tank,

effectively disabling it, while the other 2 changed direction toward the flank. As the crew of the disabled tank dismounted, Sgt. Barfoot killed 3 of them with his tommygun. He continued onward into enemy terrain and destroyed a recently abandoned German fieldpiece with a demolition charge placed in the breech. While returning to his platoon position, Sgt. Barfoot, though greatly fatigued by his Herculean efforts, assisted 2 of his seriously wounded men 1,700 yards to a position of safety. Sgt. Barfoot's extraordinary heroism, demonstration of magnificent valor, and aggressive determination in the face of pointblank fire are a perpetual inspiration to his fellow soldiers.

MEDAL OF HONOR CITATION

BARNUM, HARVEY C., JR.

Rank and organization: Captain (then Lt.), U.S. Marine Corps, Company H, 2d Battalion, 9th Marines, 3d Marine Division (Rein). *Place and date*: Ky Phu in Quang Tin Province, Republic of Vietnam, 18 December 1965. *Entered service at*: Cheshire, Conn. *Born*: 21 July 1940, Cheshire, Conn. *Citation*: For conspicuous gallantry and intrepidity at the risk of his life above and beyond the call of duty. When the company was suddenly pinned down by a hail of extremely accurate enemy fire and was quickly separated from the remainder of the battalion by over 500 meters of open and fire-swept ground, and casualties mounted rapidly. Lt. Barnum quickly made a hazardous reconnaissance of the area, seeking targets for his artillery. Finding the rifle company commander mortally wounded and the radio operator killed, he, with complete disregard for

his safety, gave aid to the dying commander, then removed the radio from the dead operator and strapped it to himself. He immediately assumed command of the rifle company, and moving at once into the midst of the heavy fire, rallying and giving encouragement to all units, reorganized them to replace the loss of key personnel and led their attack on enemy positions from which deadly fire continued to come. His sound and swift decisions and his obvious calm served to stabilize the badly decimated units and his gallant example as he stood exposed repeatedly to point out targets served as an inspiration to all. Provided with 2 armed helicopters, he moved fearlessly through enemy fire to control the air attack against the firmly entrenched enemy while skillfully directing 1 platoon in a successful counterattack on the key enemy positions. Having thus cleared a small area, he requested and directed the landing of 2 transport helicopters for the evacuation of the dead and wounded. He then assisted in the mopping up and final seizure of the battalion's objective. His gallant initiative and heroic conduct reflected great credit upon himself and were in keeping with the highest traditions of the Marine Corps and the U.S. Naval Service.

MEDAL OF HONOR CITATION

GIUNTA, SALVATORE

Rank and organization: Specialist, U.S. Army, Company B, 2d Battalion (Airborne), 503d Infantry Regiment. *Place and date*: Korengal Valley, Afghanistan, 25 October 2007. *Entered service at*: Cedar Rapids, Iowa. *Birth:* Clinton, Iowa, 21 January 1985. *Citation:* Specialist Salvatore A.

Giunta distinguished himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty in action with an armed enemy in the Korengal Valley, Afghanistan, on October 25, 2007. While conducting a patrol as team leader with Company B, 2d Battalion (Airborne), 503d Infantry Regiment, Specialist Giunta and his team were navigating through harsh terrain when they were ambushed by a well-armed and well-coordinated insurgent force. While under heavy enemy fire, Specialist Giunta immediately sprinted towards cover and engaged the enemy. Seeing that his squad leader had fallen and believing that he had been injured, Specialist Giunta exposed himself to withering enemy fire and raced towards his squad leader, helped him to cover, and administered medical aid. While administering first aid, enemy fire struck Specialist Giunta's body armor and his secondary weapon. Without regard to the ongoing fire, Specialist Giunta engaged the enemy before prepping and throwing grenades, using the explosions for cover in order to conceal his position. Attempting to reach additional wounded fellow soldiers who were separated from the squad, Specialist Giunta and his team encountered a barrage of enemy fire that forced them to the ground. The team continued forward and upon reaching the wounded soldiers, Specialist Giunta realized that another soldier was still separated from the element. Specialist Giunta then advanced forward on his own initiative. As he crested the top of a hill, he observed two insurgents carrying away an American soldier. He immediately engaged the enemy, killing one and wounding the other. Upon

reaching the wounded soldier, he began to provide medical aid, as his squad caught up and provided security. Specialist Giunta's unwavering courage, selflessness, and decisive leadership while under extreme enemy fire were integral to his platoon's ability to defeat an enemy ambush and recover a fellow American soldier from the enemy. Specialist Salvatore A. Giunta's extraordinary heroism and selflessness above and beyond the call of duty are in keeping with the highest traditions of military service and reflect great credit upon himself, Company B, 2d Battalion (Airborne), 503d Infantry Regiment, and the United States Army.

MEDAL OF HONOR CITATION

NORRIS, THOMAS R.

Rank and organization: Lieutenant, U.S. Navy, SEAL Advisor, Strategic Technical Directorate Assistance Team, Headquarters, U.S. Military Assistance Command. *Place and date:* Quang Tri Province, Republic of Vietnam, 10 to 13 April 1972. *Entered service at:* Silver Spring, Md. *Born:* 14 January 1944, Jacksonville, Fla. *Citation:* Lt. Norris completed an unprecedented ground rescue of 2 downed pilots deep within heavily controlled enemy territory in Quang Tri Province. Lt. Norris, on the night of 10 April, led a 5-man patrol through 2,000 meters of heavily controlled enemy territory, located 1 of the downed pilots at daybreak, and returned to the Forward Operating Base (FOB). On 11 April, after a devastating mortar and rocket attack on the small FOB, Lt. Norris led a 3-man team on 2 unsuccessful rescue attempts for the second pilot. On the afternoon of the 12th, a forward

air controller located the pilot and notified Lt. Norris. Dressed in fishermen disguises and using a sampan, Lt. Norris and 1 Vietnamese traveled throughout that night and found the injured pilot at dawn. Covering the pilot with bamboo and vegetation, they began the return journey, successfully evading a North Vietnamese patrol. Approaching the FOB, they came under heavy machine-gun fire. Lt. Norris called in an air strike which provided suppression fire and a smokescreen, allowing the rescue party to reach the FOB. By his outstanding display of decisive leadership, undaunted courage, and selfless dedication in the face of extreme danger, Lt. Norris enhanced the finest traditions of the U.S. Naval Service.

MEDAL OF HONOR CITATION

THORSNESS, LEO K.

Rank and organization: Lieutenant Colonel (then Maj.), U.S. Air Force, 357th Tactical Fighter Squadron. *Place and date:* Over North Vietnam, 19 April 1967. *Entered service at:* Walnut Grove, Minn. *Born:* 14 February 1932, Walnut Grove, Minn. *Citation:* For conspicuous gallantry and intrepidity in action at the risk of his life above and beyond the call of duty. As pilot of an F-105 aircraft, Lt. Col. Thorsness was on a surface-to-air missile suppression mission over North Vietnam. Lt. Col. Thorsness and his wingman attacked and silenced a surface-to-air missile site with air-to-ground missiles, and then destroyed a second surface-to-air missile site with bombs. In the attack on the second missile site, Lt. Col. Thorsness' wingman was shot down by intensive antiaircraft fire, and the 2 crewmembers abandoned

their aircraft. Lt. Col. Thorsness circled the descending parachutes to keep the crewmembers in sight and relay their position to the Search and Rescue Center. During this maneuver, a MIG-17 was sighted in the area. Lt. Col. Thorsness immediately initiated an attack and destroyed the MIG. Because his aircraft was low on fuel, he was forced to depart the area in search of a tanker. Upon being advised that 2 helicopters were orbiting over the downed crew's position and that there were hostile MIGs in the area posing a serious threat to the helicopters, Lt. Col. Thorsness, despite his low fuel condition, decided to return alone through a hostile environment of surface-to-air missile and antiaircraft defenses to the downed crew's position. As he approached the area, he spotted 4 MIG-17 aircraft and immediately initiated an attack on the MIGs, damaging 1 and driving the others away from the rescue scene. When it became apparent that an aircraft in the area was critically low on fuel and the crew would have to abandon the aircraft unless they could reach a tanker, Lt. Col. Thorsness, although critically short on fuel himself, helped avert further possible loss of life and a friendly aircraft by recovering at a forward operating base, thus allowing the aircraft in emergency fuel condition to refuel safely. Lt. Col. Thorsness' extraordinary heroism, self-sacrifice, and personal bravery involving conspicuous risk of life were in the highest traditions of the military service, and have reflected great credit upon himself and the U.S. Air Force.

MEDAL OF HONOR RECIPIENTS IN DIRECT SUPPORT OF *AMICUS CURIAE*

The following Medal of Honor Recipients have expressed a desire to be named in support of the *amicus curiae* brief of the Congressional Medal of Honor Foundation:

John F. Baker, Jr.;

Donald Ballard;

Colonel Van T. Barfoot, USA (Ret.);

Colonel Harvey C. Barnum Jr. USMC (Ret.);

SGT Gary B. Beikirch, CMH, 5th Special Forces, Vietnam;

Maj. Gen. Patrick H. Brady, USA (Ret.);

Paul W. Bucha;

Sergeant Major Jon R. Cavaiani, USA (Ret.);

Colonel Bruce P. Crandall, USA (Ret.);

SFC Sammy L. Davis;

Duane E. Dewey;

Drew Dix, USA;

Colonel Roger H.C. Donlon, USA (Ret.);

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Major Frederick E. Ferguson U.S.A.R. (Ret.);

Michael J. Fitzmaurice, USA;

Colonel James P. Fleming USAF (Ret.);

Wesley L. Fox, Colonel, USMC (Ret.);

Lieutenant Colonel Harold A. Fritz USA (Ret.);

Salvatore Giunta;

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Major General James E. Livingston, USMC (Ret.);

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Colonel Walter J. Marm, USA (Ret.);

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Colonel Robert J. Modrzejewski, USMC (Ret.);

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Leroy A. Petry;

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James A. Taylor, Major, USA (Ret.);

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Michael E. Thornton;

Leo Thorsness;

Colonel Jay R. Vargas, USMC (Ret.);

Gary G. Wetzel;

Hershel W. Williams, USMC.

MEMBERS OF THE CONGRESSIONAL MEDAL OF HONOR FOUNDATION IN DIRECT SUPPORT OF *AMICUS CURIAE*

The following Members of the Congressional Medal of Honor Foundation (but who have not received the Medal of Honor), have expressed a desire to be named in support of the *amicus curiae* brief of the Congressional Medal of Honor Foundation:

Tom Matthews, Board Co-Chairman, Congressional Medal of Honor Foundation;

Bruce Whitman, Board Co-Chairman, Congressional Medal of Honor Foundation;

Nick Kehoe, President, Congressional Medal of Honor Foundation; and

Jay E. Town, Executive Council Chairman, Congressional Medal of Honor Foundation.

AMICUS CURIAE BRIEF

No. 11-210

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT COALITION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Coalition, formerly known as the California First Amendment Coalition, is a nonprofit organization (incorporated under California's nonprofit law and tax exempt under Section 501(c)(3) of the Internal Revenue Code) that is dedicated to freedom of expression, resisting censorship of all kinds, and to promotion of the "people's right to know" about their government so that they may hold it accountable. The Coalition is supported mainly by grants from foundations and individuals, but receives some of its funding from for-profit news media, law firms organized as corporations, and other for-profit companies.

SUMMARY OF ARGUMENT

This Court has recognized only two categories of proscribable false speech: (1) false speech that causes harm to a person; and (2) false speech that harms the functioning of the government's processes. The Stolen Valor Act, 18 U.S.C. § 704(b) (the "Act"), proscribes false speech that fits in neither category. Petitioner proposes creating a new, virtually limitless category of unconstitutional false speech and a new test for

[1] The parties have consented to the filing of this *amicus curiae* brief, and their respective consent letters are submitted to the Clerk concurrently with this brief. The accompanying brief was not written in whole or in part by counsel for any party, and no persons other than *Amicus* have made any monetary contribution to the preparation or submission of this brief.

regulating false speech under the First Amendment. Petitioner's proposal should be rejected.

There is no limiting principle to Petitioner's proposed approach to proscribing false speech. Petitioner's approach would allow the government to criminalize false speech anywhere, by anyone, to anyone, regarding any subject, regardless of whether the speech caused any tangible harm, so long as the prohibition purportedly serves an "important" government interest that leaves "adequate breathing space." Petitioner's proposal requires an *ad hoc* balancing that this Court has repeatedly rejected and the First Amendment cannot countenance.

ARGUMENT

I. THERE IS NO PRECEDENT FOR CREATING A NEW CATEGORY OF PROSCRIBED FALSE SPEECH

"From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010) (internal quotation marks and brackets omitted). "These historic and traditional categories long familiar to the bar . . . are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any

Constitutional problem." *Id.* (citations and internal quotation marks omitted).

This Court has recognized only two types of false speech that may give rise to civil or criminal liability. The first type is false speech that causes harm to a person – *e.g.*, defamation, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); false light invasion of privacy, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 248 n.2 (1974); intentional infliction of emotional distress by knowing falsehoods, *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); fraud, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 617 (2003); and false speech causing a panic, *Schenck v. United States*, 249 U.S. 47, 52 (1919). The second type is false speech that harms the functioning of the government's processes – *e.g.*, perjury, *Konigsberg v. State Bar*, 366 U.S. 36, 49 n.10 (1961), and impersonation of an officer with intent to defraud, *United States v. Lepowitch*, 318 U.S. 702, 703-704 (1943). What Petitioner proposes here is an entirely new type of proscribed false speech where no person needs to show harm and the government does not need to show any harm to the functioning of its processes.

II. THERE IS NO LIMITING PRINCIPLE TO PETITIONER'S PROPOSED APPROACH TO PROSCRIBING FALSE SPEECH

Petitioner asks the Court to uphold the Act based on a proposed legal framework that is dangerous to freedom of expression. That danger should not be

obscured by the relatively modest range of criminal prohibitions on speech contained in the Stolen Valor Act itself, or by the distastefulness of Xavier Alvarez's individual speech. Petitioner's soothing-sounding "breathing space analysis" is a misnomer, falsely suggesting that its focus is on protecting free speech rights and circumscribing governmental power. In truth, Petitioner's proposed framework is the opposite. That framework would lay the groundwork for a radical expansion of the government's ability to criminalize speech.

Petitioner's proposed approach to criminalizing speech lacks any real limiting principles that might constrain future attempts to criminalize other unpopular categories of false speech. Under Petitioner's proposed approach, the government could criminalize false speech uttered *anywhere*, *by anyone*, *to anyone*, *regarding any subject*, *regardless of whether the speech caused any tangible harm*, so long as the criminal prohibition serves an "important" government interest and a judge later makes an *ad hoc* determination that it leaves "adequate breathing space." The Government would have the power to criminalize false speech made:

- *Anywhere*. The Stolen Valor Act applies to statements made in any setting, no matter how private or insignificant. Unlike other statutes that forbid lying on the witness stand or on government forms, or imposing liability for defamatory statements that are "published," the Act contains no limitations

regarding setting or situation. Nor does Petitioner's proposed approach to proscribing false speech admit any such limitations. Upholding the Stolen Valor Act means the government may punish false speech not only in government meetings or public forums, but in private settings, living rooms and dinner tables across the country.

- *By anyone*. Although the Act is being applied here against Xavier Alvarez, an aspiring politician with an apparent history of fabrications, the Act is not limited to people who tell lies in order to increase their political popularity or obtain some other concrete advantage related to matters of public or even private interest. On its face, the Act – and the Petitioner's proposed approach to false speech – apply equally to the drunk on a bar stool telling tall tales at closing time, to a homeless person with a sign by the side of the freeway hoping to gain drivers' sympathy and dollar bills, or to an 18-year-old in his parent's basement making unwarranted boasts in an Internet forum.

- *To anyone*. The Act does not require that the false statement be made to an audience for whom the speech potentially matters. Some statutes criminalize false speech made to the government, to a judge and jury, and to lenders (*e.g.*, bank fraud, wire fraud) and investors (*e.g.*, securities fraud). In the defamation context, a statement must be published to a third party, ensuring that a federal case is not made about false speech that cannot possibly

do any harm to someone's reputation. With fraud claims, speech must be made to someone who actually relied on the misrepresentation (in the case of civil fraud) or from whom the speaker seeks something of value. The Act and Petitioner's proposed approach contain none of these limitations. The government may prosecute someone for violating the Act even if that person only made a false statement to one other individual who was not deceived and knew the speaker was lying all along.

- *Regarding any subject.* Although the Act criminalizes falsehoods regarding military decorations and medals, Petitioner's approach to proscribing false speech gives the government the ability to target false speech regarding *any* subject. This fact was not lost on Judge Smith, *Alvarez*, 617 F.3d at 1200, or Chief Judge Kozinski, *Alvarez*, 638 F.3d at 673-675 (concurring in denial of rehearing *en banc*). *See infra*.

- *Regardless of whether the speech caused any tangible harm.* Defamation and other speech-related torts all require that a plaintiff has been harmed personally. Perjury interferes with the functioning of the judiciary. The Act contains no such limitation, and applies even to speech that deceives no one and causes no tangible harm.

Judge Smith and Chief Judge Kozinski both expressed concern at the limitless reach of Petitioner's proposed approach to proscribing false speech. *See*

United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010) (*Alvarez I*); *United States v. Alvarez*, 638 F.3d 666, 673-675 (9th Cir. 2011) (*Alvarez II*) (Kozinski, J., concurring in denial of rehearing *en banc*). As Chief Judge Kozinski succinctly put it: "If all untruthful speech is unprotected . . . we could all be made into criminals, depending on which lies those making the laws find offensive." *Alvarez*, 638 F.3d at 675. In response to these concerns, the Petitioner's Brief says virtually nothing. Petitioner ignores the import of Judge Smith's and Chief Judge Kozinski's arguments and focuses only on the Act itself, which the Government characterizes as prohibiting a "discrete category of false misrepresentations . . . [that] bears little resemblance to the false statements" about which Judge Smith and Chief Judge Kozinski express concern. Brief for Petitioner United States of America (hereinafter "Pet. Br.") at 52.

That lack of resemblance misses the point. In defending the Act, Petitioner is advocating an open-ended regime that would give federal, state and local governments the presumptive power to criminalize *any* false speech, not just certain statements about military honors or medals. Petitioner's approach contains no limitations that would prevent governments from punishing precisely the sort of speech about which Judge Smith and Chief Judge Kozinski express concerns. In a very telling omission, Petitioner fails to explain why the potential prohibitions that disturb Judge Smith and Chief Judge Kozinski could not be

upheld under Petitioner's proposed framework for criminalizing false speech.

The only limitations Petitioner's proposed framework admits are that a statute criminalizing false speech must serve an "important" government interest, and there must remain sufficient "breathing space" for other fully-protected speech. Pet. Br. at 13-14. However, neither limitation provides any real protection. Clever lawmakers and government attorneys can always find some connection, real or imagined, between a particular prohibition and a broadly stated government interest that may or may not, in fact, lie behind the prohibition, and that is invariably described as "important." (Indeed, if the Government has ever characterized a Congressional purpose as unimportant, we are unaware of it.) In this case, Petitioner has shown remarkable creativity in arguing that the Act's prohibition is not motivated by moral outrage at pretenders claiming military honors, but by an asserted interest in some amorphous *esprit de corps* that Petitioner dubiously claims the Xavier Alvarezes of the world will undermine unless silenced by criminal sanctions. Pet. Br. at 14.

The "breathing space" limitation is even more deficient in safeguarding First Amendment interests. Petitioner starts with the presumption that criminalization of false speech is permissible, and places the burden on criminal defendants to prove that their speech should receive some unspecified "measure of strategic protection" in order to ensure that adequate breathing space exists for other fully-protected speech.

Id. at 20. As the Ninth Circuit held below, placing the burden on the defendant to prove that, on balance, the "pros" of protecting his speech outweigh the "cons" "runs contrary to Supreme Court precedent." *Alvarez I*, 617 F.3d at 1204. In *New York Times v. Sullivan*, 376 U.S. 254, 271-272 (1964), this Court held that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive." In *Stevens*, 130 S.Ct. at 1585, this Court held that it is "startling and dangerous" to suggest that "whether a category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."

This Court – not to mention the Founding Fathers – had good reason to distrust the effectiveness of leaving the safeguarding of free speech rights to a "free-floating" case-by-case balancing of the value and costs of particular speech. *Id.* As the Ninth Circuit held below, "in nearly every case, an isolated demonstrated false statement will not be considered 'necessary' to promoting core First Amendment values" and "will be outweighed by the perceived harm" it creates. *Alvarez I*, 617 F.3d at 1204. Thus, the likely net result of Petitioner's proposed approach would be that virtually all criminal prohibitions against false speech would be upheld.

Chief Judge Kozinski identifies another constitutional infirmity in Petitioner's "breathing space" approach: it is extraordinarily vague and, therefore,

fails to provide speakers with notice of what speech is criminal while conferring on government prosecutors discretion to target speakers whose views they do not like. Under Petitioner's approach, speakers "have no way of knowing in advance whether" the courts will determine "in any particular instance" that certain false speech must be protected to prevent chilling other fully-protected speech. *Alvarez II*, 638 F.3d at 675. Petitioner's approach is so "ad hoc and subjective that no one . . . can say with assurance what side of the line particular speech falls on." *Id.* at 676. "Free speech simply cannot survive the kind of subjective and unpredictable regime envisioned by" Petitioner. *Id.*

III. PETITIONER PROPOSES NOTHING MORE THAN THE *AD HOC* BALANCING ANALYSIS OF SOCIAL COSTS AND BENEFITS PROSCRIBED BY THIS COURT'S EARLIER DECISIONS, MOST RECENTLY IN *UNITED STATES v. STEVENS*

The heart of Petitioner's argument is the assertion that the Stolen Valor Act is very important to protect the integrity – a term of less-than-scientific precision – of the "Military Honors System." Pet. Br. at 37-39. That is the starting point: "It is important to protect the integrity of a law."

Petitioner then attempts to convince the Court that the importance stems from two facts: "military medals and decorations serve the important public function of recognizing and expressing gratitude for

acts of heroism and sacrifice in military service"; and "[t]he extent to which the military honors program serves these critical goals depends on the government's ability to safeguard the program's integrity." Pet. Br. at 38. In other words, it is important to protect the integrity of the Military Honors System because the United States says it is. That tautology having been recited, Alvarez must be jailed.

This Court rejected that facile analysis recently in *Stevens* as "an ad hoc balancing of relative social costs and benefits." 130 S.Ct. at 1585. The Court there stated, "[o]ur Constitution forecloses any attempt to revise [the] judgment [that the benefits of the First Amendment outweigh its costs] simply on the basis that some speech is not worth it. The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" *Id.*

The fallacy in Petitioner's argument is that the mere pronouncement that some category of speech is important and must be controlled is sufficient to justify the finding of a compelling interest for proscribing that speech. Why does the First Amendment state that "Congress shall make no law," merely to cede that point upon any occasion when elected officials decide it is *important* to do so? That type of thinking – balancing the goring of one person's ox against that of another's – is not permitted, as this Court recently and rightly held.

"When we have identified categories of speech as fully outside the protection of the First Amendment,

it has not been on the basis of a simple cost-benefit analysis." *Stevens*, 130 S.Ct. at 1586. As an example of sounder reasoning, in the child pornography context, this Court's decision did not rest on the "balance of competing interests alone." *New York v. Ferber*, 458 U.S. 747, 764 (1982). Yet that is what Petitioner urges here.

Petitioner ignores this Court's warning in *Stevens* that its decisions

> cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

Stevens, 130 S.Ct. at 1586.

"Manipulable" is an apt adjective to apply to Petitioner's suggested analysis here. It is an analysis that can be urged by anyone in the future at any time to stop any type of false speech that the lawmaker finds distasteful. This frightening characteristic justifies the use of the words "truth police" in Judge Kozinski's opinion in the Ninth Circuit. *Alvarez II*, 638 F.3d at 674 (Kozinski, J., concurring in the denial of rehearing

en banc). The manipulable test proposed by Petitioner resembles the reasoning relied upon by closed, autocratic regimes of the former Eastern Bloc and many regimes today (North Korea, Iran, and Singapore, just to name a few). The manipulable test is: The law is justified because an icon, set upon its pedestal by those in power, must not be diminished or demeaned by speech that the regime says is false.

Petitioner's attempted justification of the law in question provides a perfect stencil for re-enactment of the infamous Sedition Act of 1798, which forbade "any person" to:

> write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.

New York Times v. Sullivan, 376 U.S. 254, 273-274 (1964) (quoting Sedition Act of 1798, 1 Stat. 596) (first four omissions in original). This Court held that, "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history," due to a "broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *New York Times*, 376 U.S. at 276 (footnote omitted).

The law in question here criminalizes speech because Petitioner says it brings the government of the United States, *i.e.*, the integrity of its "Military Honors System," into contempt or disrepute. For a short period in our nation's early history, that type of thinking had some sway. But it died more than two centuries ago. *See New York Times*, 376 U.S. at 291 ("no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence") (internal quotation marks omitted); *see also Alvarez II*, 638 F.3d at 672-673.

Of course, we are not suggesting that Petitioner's arguments imply approval of the Sedition Act, a statute condemned by history as anathema to First Amendment principles. However, we are suggesting that if the Sedition Act could pass muster under Petitioner's proposed test for laws criminalizing false speech, there must be something very seriously wrong with Petitioner's test. Would a Sedition Act indictment meet Petitioner's proposed test limiting false speech prosecutions to laws that advance an "important" government interest? Yes. What could be more important than protecting the integrity and good standing of the institutions of the United States government? Indeed, that is essentially the same interest Petitioner advances to justify the Stolen Valor Act. Would a Sedition Act prosecution satisfy Petitioner's requirement that a prohibition of false speech must leave "adequate breathing space" for true speech that is constitutionally protected? The answer here is a bit

less certain, but prosecutors could argue forcefully that sufficient breathing room was provided by the Sedition Act's limitation to cases of *knowingly* false statements (implied by the statutory requirement of an "intent to defame").

The Stolen Valor Act cannot be sustained without doing serious damage to First Amendment freedoms. This Court's decisions over many years have erected a constitutional firewall requiring, in effect, that the Government stay completely out of the business of policing the accuracy of expression about government or governmental interests. Petitioner's arguments would lower this wall to a dangerous degree.

The inevitable consequence of adopting Petitioner's argument is unacceptable to a free society. A chillingly simple procedure robs us of our freedom: First, the government erects a program, hanging a label of "vital" (the label applied here), "in the interests of national security", "a government objective of surpassing importance", "necessary to protect privacy by preventing the intrusion into the home of unwelcome views", or one of multiple other formulations upon the program. Then it is deemed to be a criminal act to bring contempt or disrepute upon that scheme in any way that the current vogue finds fashionable. This analysis is so *ad hoc* and dependent upon subjective views of the moment, to whims and tides of public opinion and the political ambition of lawmakers, that it cannot survive when exposed to First Amendment scrutiny.

CONCLUSION

The Stolen Valor Act, the justifications for that law and Petitioner's proposed "breathing space" test cannot withstand scrutiny under the First Amendment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-210

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

V.

XAVIER ALVAREZ,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*

Amicus First Amendment Lawyers Association is composed of attorneys whose practices substantially involve free expression matters ranging from those involving political speech to issues surrounding sexually oriented expression. Both the Association and its members are vitally interested in the sound development, articulation, and application of First Amendment law. The First Amendment Lawyers Association is a nationwide membership organization, and its Board of Officers has authorized the filing of this brief.[1]

SUMMARY OF THE ARGUMENT

This Court should reject the so-called "breathing space" approach which the government urges here. It would elevate *one* reason which this Court has articulated for protecting false statements into the *only* reason for doing so; and it would thus extend First Amendment analysis in a dangerous and novel direction. Established First Amendment analysis serves the Constitution well because *Chaplinsky* "exceptions" are individually small and collectively few. Yet a new categorical exception for simple lies—even one limited by "breathing space" considerations—would be unlike most other recognized exceptions. When those exceptions involve falsity at all, there is always distinctly more involved than mere falsity—often some direct distortion of the marketplace of ideas.

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[1] The parties have consented. Rule 37.3(a). No counsel for any party authored this brief in whole or in part, and no one other than the instant *amicus* and its counsel and members made any monetary contribution to the preparation or submission of this brief. *Cf.* Rule 37.6.

Even indubitably and objectively false statements of fact offer some real value in understanding the truth; and, even if they did not, worthlessness alone does not deprive expression of constitutional protection. The government cannot use the criminal law to preserve the sacrosanct character of military honors and awards any more than it may so protect the national flag. There is ultimately no need to conclude that the lie at issue here is unprotected, since the government may fully serve its legitimate interests by more speech: it can easily publish lists of military honorees; and it can even criticize those who falsely claim military honors.

ARGUMENT IN SUPPORT OF RESPONDENT

I. First Amendment Analysis, as this Court Has Articulated It for Decades, Is Properly Hostile to the Sort of Approach Which The Government Urges Here.

Because of the deep interest of the First Amendment Lawyers Association in the sound development, articulation, and application of First Amendment law, this *amicus* brief begins with an assessment of some of the most basic features of the freedom of expression, as this Court has formulated it for many decades. It then draws upon several aspects of established First Amendment analysis in order to bring to this Court's attention just how startling is the position urged by the Government here.

A. *Chaplinsky's* Categorical Approach to Speech Protection Questions Has Served the First Amendment Well Principally Because this Court Has Wisely Kept the "Exceptions" Individually Small and Collectively Few.

Most expression is immune from content-based government regulation unless the restriction in question can withstand strict scrutiny. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 118 (1991). In contrast, some expression can be regulated precisely *because* of its content. Indeed, speech can be *categorized by content*, for constitutional purposes, and a few narrow speech categories are considered constitutionally unprotected while most fall fully within "the freedom of speech, or of the press," U.S. Const. Amend 1 cl. 3, 4, and are thus protected. *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733-34 (2011); *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010); *State of Virginia v. Black*, 538 U.S. 343, 358-60 (2003). Beginning with *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), this Court noted that:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the

> insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes and quotation marks omitted).

Set as it is against the backdrop of a firm presumption that expression is protected by the First Amendment, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816-17 (2000), *Chaplisnky's* so-called "two-level" approach to speech protection, *cf.* H. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 S. Ct. Rev. 1, 10, has served the First Amendment well.

Two essential characteristics of that approach have stood the test of time and remain critical to the very substantial protection which the Constitution affords to expression. First, as just noted, the *Chaplinsky* approach is universally understood to stand against a prior and more fundamental presumption that *all* expression is protected by the First Amendment. *E.g. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). Among other things, this means that the burden is always on the government (or other party urging that expression is unprotected) to demonstrate, by the appropriate quantum of proof and under the applicable constitutional standard, that particular expression falls within a constitutionally unprotected class of expression. *Id.* at 816. The second critical feature is that the question of full constitutional protection *vel non* is assessed and answered categorically in the sense that if the precise expression at issue falls on the protected side of the constitutional

line, even by just a bit, it remains *fully* protected on the same terms and by the same constitutional standards as even the most clearly protected expression. *Free Speech Coalition*, 535 U.S. at 240, 251.[2]

These features of the *Chaplinsky* approach remain valuable bulwarks against the potential erosion of constitutional protections which would arise if the level of speech protection were assessed on a case-by-case balancing basis against a spectrum of expression. In other words, it is critical that all expression is presumed to be on the broad protected constitutional plateau rather than within a narrow unprotected hole and, further, that the boundaries between the vast plateau and rare holes are constitutional cliffs, not broad and gentle downhill slopes.

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[2] A third characteristic of *Chaplinsky*'s categorical approach has recently received some well-deserved attention from this Court. As this Court has now expressly recognized, *Chaplinsky* does *not*, after all, mean that certain classes of expression are *altogether* unprotected by the First Amendment. The proposition that a certain category of expression can be suppressed without raising "any Constitutional problem," *Chaplinsky* at 572, ultimately entails nothing more than a recognition that there is *at least one* constitutionally acceptable reason for suppressing it; it does not necessarily mean that *any* reason will do. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992). This aspect of *Chaplinsky*—while warranting this Court's close continued attention—is not at issue in this case.

B. Most of *Chaplinsky's* "Exceptions" Arise from Free Expression Principles Themselves, Not Because Other Considerations Overcome Such Constitutional Concerns.

In assessing whether any particular category of expression is "unprotected" under the First Amendment, it is important to understand exactly how the *Chaplinssky* categories relate to the rest of First Amendment jurisprudence. That is, it is critical to examine *why* the so-called unprotected classes of expression have been recognized as such—whether as a purely historical matter or otherwise. At first blush, one might assume that a speech category could only be unprotected because some *non*expression-related concern has somehow "trumped" the principles underlying the First Amendment's general protection of expression. But this is not the situation in most cases. Far more often, a category has been recognized as unprotected under *Chaplinsky* precisely because the underlying free expression principles *themselves* apply to that expression, in its unprotected context, in unusual ways which call for the different treatment.

Incitement provides an illustrative example. Though not originally formulated within the *Chaplinsky* framework at all, *cf. Brandenburg v. State of Ohio*, 395 U.S. 444 (1969); *Schenck v. United States*, 249 U.S. 47 (1919), incitement now routinely appears in this Court's listings of the *Chaplinsky* categories, *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2011); *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010); *State of Virginia v. Black*, 538 U.S. 343, 359 (2003). Under the First

Amendment, the government may punish incitement to serious lawlessness if, but *only* if, it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* at 447 (footnote omitted). But this is not a result of some outside government interest—in law and order, perhaps—outweighing or otherwise vitiating free expression principles. It is a result of the natural application of the free expression principles themselves.

The First Amendment derives a great deal of its force in protecting expression against censorship from the understanding—famously articulated by Justice Brandeis' in his now-vindicated concurrence in *Whitney v. State of California*, 274 U.S. 357, 372 (1927)(Brandeis, J., concurring)—that "a fundamental principle of American government," *id.* at 375, demands that:

> ...no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

Id. at 377 (footnote omitted). Since "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine," *id.* at 375, the *nearly* universal rule under the First Amendment is

that "the fitting remedy for evil counsels is good ones," *ibid.* But our fundamental free expression principles recognize that there are very rare situations—the lynch mob or the riot, for instance—where full discussion has no chance to persuade and where the ordinary deterrent value of criminal sanctions against unlawful *behavior* may temporarily be lost in the fray. *Cf. Hess v. State of Indiana*, 414 U.S. 105, 108 (1973)(reversing incitement conviction arising from *near*-riot situation). And it is in just these situations that the incitement category comes to the fore. Its recognition thus *furthers* the most basic free expression principles; it does not limit them.

Very similar observations apply to such categories as true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969), and criminal solicitation and conspiracy, *Giboney v. Empire Storage & Ice. Co.*, 336 U.S. 490, 498 (1949), when those categories are properly limited by general First Amendment considerations. They would also apply, if this Court were ever confronted with the matter, to a claim that military or paramilitary orders—in the context of a pre-established, operating disciplinary regime under which such orders clearly function as "triggers to action" rather than "keys to persuasion," *cf. Masses Publishing Co., v. Patten*, 244 F. 535, 540 (1917)(L. Hand, J.), *rev'd* 246 F. 24 (1917)—ought to be afforded substantial First Amendment protection.

More immediately, though, the same can also be said of another major *Chaplinsky* category: defamation. Defamation, as a category recognized by *Chaplinsky* and sharply limited by *New York Times Co, v. Sullivan*, 376 U.S. 254 (1964), and its progeny, reflects far, far more than a recognition that false

statements of fact are less valuable—as expression—than true ones. If that were the only operative consideration, Justice Brandeis' observation that "the fitting remedy for evil counsels is good ones," *Whitney* at 375, need only be adjusted ever so slightly: the fitting remedy for false speech is true speech.

But defamation, of course, requires much more than mere falsity. It requires *disparaging* falsity directed against an individual or entity.[3] And it requires that the the falsity result from the speaker's *fault*. Modern defamation law cannot even realistically assume that an audience believes everything it hears. The modern marketplace of ideas, *cf. Abrams v. United States*, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting), is wide open to the targets of disparaging falsehoods, and it provides them a full opportunity to vindicate their reputations and their honor. But it is precisely that necessary link between this market process and the speaker's fault which justifies imposing liability upon the speaker. In a *Sullivan* context, the speaker has knowingly or recklessly, *Sullivan* at 280, imposed upon those (s)he has falsely disparaged the *cost* of entering the into marketplace of ideas in order to speak the truth. Those

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[3] For almost sixty years, this Court has found no occasion to reapply the precise holding of *Beauharnais v. State of Illinois*, 343 U.S. 250 (1952). to uphold a criminal conviction under a so-called "group libel" law. Indeed, criminal libel convictions—of any sort— are now quite rare, for many good reasons. In a civil context, thorny standing issues would arise if a group libel cause of action were brought seeking money damages. But beyond these considerations and whatever else may be said of *Beuaharnais*' more general observations, it is difficult to find much continuing vitality in its precise holding concerning group defamation.

costs may be small or they may be large depending on the nature of the falsehood. But it is *because* the disparaging falsehood is so closely connected with the reputation of the targeted individual or entity that the law reasonably expects the defamation target to take up the issue and respond. This is why our most basic free expression principles—ordinarily relying on "more speech" in "the marketplace of ideas"—permit civil liability when, through a speaker's fault, a targeted disparaging falsehood has effectively *forced* a defamation victim into the marketplace of ideas. *Cf. BE&K Construction Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002)(objectively baseless lawsuits force defendants into court, imposing obvious burdens and costs).

This understanding shows that, once again, a *Chaplinsky* category arises directly from underlying free expression principles, not from a conflict where those principles yield to others of a different sort. But this understanding also shows the limits of the exception: where falsity does not involve the disparagement of particular persons or entities, there is no reason to suspect that particular persons will be drawn unwillingly into the fray of the marketplace of ideas. Where even the clearest false statement of fact is broadcast without specifically targeting anyone in particular, our tradition and our law leave the false statement—as we leave the false counsel—to the marketplace of ideas where, happily, there is no shortage of volunteers who are eager to rise to challenge statements seen as foolish or false.

C. This Court Should Remain Most Reluctant to Identify *Chaplinsky* "Exceptions" Which Do Not Arise From Fundamental Free Expression Principles Themselves.

This Court has recently been confronted with a number of requests by governments to recognize additional categories of expression as "unprotected" under *Chaplinsky*. *E.g. Brown v. Entertainment Merchants Ass'n,* 131 S.Ct. 2729, (2011)(violent video games directed at children); *United States v. Stevens,* 130 S.Ct. 1577 (2010)(videos depicting unlawful and gratuitous animal cruelty); *Ashcroft v. Free Speech Coalition*, 353 U.S. 234(1994)(virtual or apparent, but not actual, child pornography); *Hudnut v. American Booksellers Ass'n, Inc.*, 475 U.S. 1001 (1986) *summarily aff'g* 771 F.2d 323 (7th Cir. 1985)(expression demeaning and dehumanizing women). As it happens, these speech categories have differed sharply from those discussed *supra* in that the free expression principles underlying the First Amendment were and are perfectly consistent with affording the expression in these proffered categories the usual full measure of First Amendment protection. In other words, the governments in those cases argued, not that free expression principles themselves called for unusual treatment of a particular category in particular circumstances, but that entirely *unrelated* or even *contrary* considerations called for regulation. These are very different claims under *Chaplinsky*, and this Court has wisely rejected each of them in recent years. Where the claim is that some category of expression must yield to governmental concerns unrelated to the expression—or re-

lated only in the sense that the government worries that the speech will have bad effects if believed by its audience—this Court has demanded the strictest justification and engaged in a searching historical quest for precedent. It has quite properly found each recent claim for a new *Chaplinsky* category to be wanting—most often seriously so.

Once again, a government comes before this Court claiming that expression should be suppressed—not because of some failure of the marketplace of ideas—but because that expression *might be believed* and if so, the resulting beliefs might dilute the quality of military honors and awards and, somehow too, the honor of those who have legitimately received such honors. It is difficult to understand the latter suggestion upon thinking it through. If an individual's false claim to have earned a military honor or award is believed, then the believers are likely to honor the liar just as they do others who legitimately deserved the award. That honor would be improper in the particular case, but it would not meaningfully taint the honor directed to others. If, on the other hand, the audience has reason to doubt the liar's claim, then no more harm will have been done to the military honors or to their legitimate recipients than that which results from the ravings of a madman claiming to be the rightful heir to the throne of Great Britain. But there are two even more serious particulars which must give this Court serious pause here.

The first is that the concern raised by the government here bears an uncanny resemblance to the governmental interests forcefully rejected not only in *New York Times v. Sullivan*, 376 U.S. 254 (1964), but also in *State of Texas v. Johnson*, 491 U.S. 397,

413-18 (1989), and *United States v. Eichmann*, 496 U.S. 310, 318 (1990)("Government may create national symbols, promote them, and encourage their respectful treatment. But...criminally proscribing expressive conduct because of its likely communicative impact" remains unconstitutional). *Sullivan* articulated the principle—long before established by our political culture—that a democracy cannot defend its reputation against the opinion of its citizens by force of law. And the flag desecration cases continued to make it unmistakably clear that such matters as government honor and respect—symbolized by the national flag every bit as much as by military medals—are not to be snatched away from the marketplace of ideas upon which we rely so centrally to discern the truth from "a multitude of tongues." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 512 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), *quoting United States v. Associated Press*, 54 F. Supp. 362, 372 (S.D. N.Y. 1943)(L. Hand, J.)("the interest protected by the First Amendment...presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all"), *aff'd* 326 U.S. 1 (1945).

But even more obviously, the government's claim for another categorical exclusion of a category of speech from First Amendment protection—or, equivalently, the assertion that a compelling government interest must trump the expression in this case—must fail because there is simply *no need* for it. General free expression principles provide a ready an-

swer for the government. The remedy prescribed by Justice Brandeis so long ago—"more speech"—fully suffices here. The United States makes no secret of who receives military honors and awards. On the contrary, the many purposes underlying the system of military honors and awards are best served by *publicizing* both the awarded honors and the actions which warranted them. And if it ever appears to the United States that it is not enough to have the absence of expected newspaper articles and other press coverage refute a false claim about military honors, the United States has the simple and extraordinarily inexpensive alternative of establishing and publicizing a World Wide Web site disseminating authoritative information about military awards and their legitimate recipients. The United States would even be free to add its own voice to such a website and criticize by name those found to have made false claims with respect to military honors. It seems a dramatic constitutional understatement to observe that this is a less speech-restrictive alternative. Such an easy and readily available "more speech" alternative—fully serving the government's legitimate needs—is reason enough to reject any request in this case that a flat-out lie about a military honor should be subject to constitutionally legitimate criminal sanction.

II. This Case Presents No Occasion to Modify the First Amendment's Protection of Expression or the Analysis Historically Applied to Free Speech Challenges.

In light of the foregoing considerations, established constitutional principles fully serve the government's interest here—except for the improper insistence on criminally punishing expression which might, if believed, tarnish a sacrosanct government domain. There is simply no need in this case to alter the analysis which this Court has long applied to challenges to statutes which criminalize speech. In particular, there is no need to alter or limit the historical understanding that all expression is presumptively protected under the First Amendment. There is no proper basis for treating some expression—while it may well be, in some sense, less important in its own right—as constitutionally protected only insofar as necessary to safeguard other, more important expression. While that may indeed be one reason to protect objectively false statements of fact, the government errs in assuming that it is the *only* reason and, thus, that in its absence false speech may be freely criminalized by government.

A. This Court Should Reject the Proposition that a False Statement of Fact, Without More, Is Unprotected by the First Amendment.

The government predicates its entire constitutional analysis on the proposition that a false statement of fact is *ipso facto* unprotected by the First Amendment. This is not the law under our Constitution, nor should it be. In the first place, what this Court has

actually *said* in the past, with perhaps one passing exception, is that a false statement of fact *lacks any value* under the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)("there is no constitutional value in false statements of fact"). Even here, this Court has been careful to vary, and sometimes weaken its language in the past. *Compare Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988)("particularly valueless") *with*, *Herbert v. Lando*, 441 U.S. 153, 171 (1979)("no First Amendment credentials"). Nevertheless, it was perhaps possible until recently to make the logical leap from a lack of value to a lack of constitutional protection, and even this Court may have once done just that in passing. *BE&K Construction Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002)(baseless, retaliatory lawsuits are unprotected against unfair labor practice determination). But this Court has very recently made it unmistakably clear that lack of value does not, standing alone, suffice to remove expression from the First Amendment's protection. *United States v. Stevens*, 130 S.Ct. 1577, 1586 (2010)(First Amendment law "do[es] not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an *ad hoc* calculus of costs and benefits tilts in a statute's favor"). So in light of this Court's most recent decisions, the necessary logical bridge from worthlessness to non-protection collapses, and the government's constitutional case never really gets off the ground.

Beyond this, this Court would be wise to avoid resting any holding solely upon the proposition that

false statements of fact have no First Amendment value. The contrary views of many thoughtful philosophers alone should give this Court considerable pause. To take but a single leading example, John Stuart Mill famously devoted Chapter 2 of *On Liberty* to the "Liberty of Thought and Discussion." In the first half of that chapter, he advances the skeptical argument—later echoed by Justice Holmes in his now-vindicated dissent in *Abrams v. United States*, 250 U.S. 616, 629 (1919)(Holmes, J., dissenting)("time has upset many fighting faiths")—that it is wrong to suppress falsity because fallible human beings can never know for certain that the matter being suppressed is indeed false. J.S. Mill, *On Liberty* 17-34 (Appleton-Century-Crofts 1947). But he devotes the second half of his chapter to showing why even indubitably and objectively false statements do indeed have value for those who confront them. *Id.* at 34-45.

An everyday example may illustrate many of the salient points, particularly those advanced by Mill on the second branch of his argument. Many adults make factual statements to children about Santa Claus—statements which are as objectively false as the lie which began this case. Those false statements may indeed have some temporary value in fostering the fantasy world which children enjoy. But their deeper and more lasting value may well lie in their *falsity itself*: allowing children to discover the truth for themselves, each in his or her own time and own way. In so doing, a child gains a confidence about his or her understanding of the world which could never result from even the most robust diet of regulated, spoon-fed truth. And for adults as well, substantial

First Amendment value often lies in seeing just how and just why even an objectively false statement of fact is wrong. *On Liberty* at 37-38:

> mankind ought to have a rational assurance that all objections have been satisfactorily answered; and how are they to be answered if that which requires to be answered is not spoken? or how can the answer be known to be satisfactory, if the objectors have no opportunity of showing that it is unsatisfactory?

B. This Court Should Reject the "Breathing Space" Approach as an Independent or Sufficient Constitutional Test for Laws Criminalizing False Statements of Fact.

1. "Breathing Space" Is Not an Analytical Standard, but Instead, One Justification for Maintaining Constitutional Protection for False statements.

The government argues that this "Court has consistently applied the *breathing space approach* to various restrictions on false factual statements." Pet. Br. at 20 (emphasis added). But the government's so-called "breathing space" approach is not a separate First Amendment analysis articulated by this Court. It is rather *one* justification which this Court has often advanced for affording constitutional protection even to false statements of fact. *New York Times v. Sullivan*, 376 U.S. 254, 271-272 (1964)(*citing N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)("Be-

cause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). The government would thus transform one reason for protecting false statements of fact into the *only* reason for doing so, and then use that logical leap to radically alter the analysis applied to statutes which criminalize false expression. On the other hand, the approach taken by the Ninth Circuit below is fully consistent with this Court's analysis of the freedom of speech under the First Amendment:

> ...we presumptively protect all speech against government interference, leaving it to the government to demonstrate...the historical basis for or a compelling need to remove some speech from protection (in this case, for some reason other than the mere fact that it is a lie). Though such an approach may result in protection for a number of lies, which are often nothing more than the "distasteful abuse of [the First Amendment] privilege," *Cohen*, 403 U.S. at 25,... it is constitutionally required because the general freedom from government interference with speech, and the general freedom to engage in public and private conversations without the government injecting itself into the discussion as the arbiter of truth, contribute to the "breathing space" the First Amendment needs to survive.

United States v. Alvarez, 617 F.3d 1198, 1205-1206 (2010), *quoting Cohen v. California*, 403 U.S. 15, 25 (1971).

The government's novel "breathing space" analysis —articulated as an independent constitutional test— runs, in fact, directly counter to this Court's jurisprudence, because it is predicated upon the incorrect proposition that expression is presumptively unprotected by the First Amendment unless it is true. The corollary to the government's false premise is, of course, the proposition that false statements of fact are presumptively *un*protected unless, perhaps, it can be shown that they are of high enough value to be allowed First Amendment protection or, more likely that they relate in a certain way to statements which lie at the core of protected expression. Pet. Br. at 20-21 ("Rather, [this Court] has approved content-based restrictions on false factual statements outside the commercial context when the restriction in question is supported by a strong government interest and provides adequate 'breathing space' for fully protected speech" (footnote omitted)).

2. The Government's Brief Illustrates the Traditional First Amendment Approach that Requires an Additional Element of Harm, Before even False Statements Lose Presumptive First Amendment Protection.

None of the government's cited cases supports its "breathing space" approach as an independent and adequate constitutional test for proscriptions criminalizing false statements of fact. In fact, each of the cases underscores the Court of Appeals' proper conclusion that the constitutional permissible criminalization of an objectively false statement of fact re-

quires "some reason other than the mere fact that it is a lie." 617 F.3d 1204. As noted *supra*, this Court has offered the need for "breathing space" as a primary rationale for constitutional protection of false statements in public discourse. *New York Times v. Sullivan*, 376 U.S. 271-72. Yet the language of Sullivan itself clearly belies the government's argument that such statements are presumptively unprotected unless it can be shown that a false statement's contributes to "breathing space." *Sullivan*, 376 U.S. at 271 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth-whether administered by judges, juries, or administrative officials...")

The government essentially predicates its entire argument on the premise that "false factual statements have no First Amendment value in themselves." Pet. Br. at 18. Yet in each of the legal areas raised by the government, *proscribable* false statements require something more than mere falsity in order to overcome the general constitutional presumption protecting expression.

The government discusses defamation. Pet. Br. at 21-23. Yet, within that realm, even the clearest proof of falsity alone is insufficient without a demonstration of additional elements—one of which is the injury which follows from a *disparaging* falsehood *directed at* the plaintiff. *See supra* at 9. "[T]he private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 350 (1974).

While reputational injuries are most commonly associated with defamation actions, other types of injury may also be subject to compensation. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976)("Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.") False light invasion of privacy, *cf.* Pet. Br. at 24-25, similarly requires a showing of harm. *Time v. Hill*, 385 U.S. 374 (1967).

> Although not usually thought of in terms of 'right of privacy,' all libel cases concern public exposure by false matter, but the primary harm being compensated is damage to reputation. In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage.

385 U.S. at 385.

The government's assertion, Pet. Br. at 25, that *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), "extended the 'breathing space' approach to public figure actions for intentional infliction of emotional distress based on false factual statements," misinterprets this Court's ruling in that case. The tort of intentional infliction of emotional distress, obviously implicates a particular sort of injury. Moreover, no claim was made in that the outrageous parody contained in the magazine was a factual rendition of events that actually occurred. On the contrary, this Court ruled in favor of the magazine based on its acceptance of the jury finding that the

parody would not be viewed as a factual assertion by any reasonable reader.

> The jury found against respondent on his libel claim when it decided that the *Hustler* ad parody could not "reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated." The Court of Appeals interpreted the jury's finding to be that the ad parody "was not reasonably believable," and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by "outrageous" conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here.

485 U.S. at 57 (internal citations omitted)

Contrary to the government's assertion that this Court applied an independent "breathing space" analysis, it straightforwardly applied the *New York Times* standard, which requires considerably more than a showing of a false statement of fact.

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of

> fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the New York Times standard, *see Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment.

485 U.S. at 56. Thus this Court viewed the concept of "breathing space" not as an independent and sufficient First Amendment analysis, as the government suggests, but rather one justification for treating all speech as presumptively protected, subject to proscription *only* if a combination of elements, including a specific sort of harm, are present.

The government's invocation of fraud as an example of "breathing space" analysis, Pet. Br. at 26, is clearly misplaced, as no one would argue that merely making a false statement is equivalent to fraud. As the government's cited case demonstrate, fraud necessarily involves an element of harm separate from the meaning of the false words used. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 184 (1948) ("The purpose of mail fraud orders is not punishment, but prevention of future injury to the public . . ."); *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

> *False statement alone does not subject a fundraiser to fraud liability.* As restated in Illinois case law, to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a

> material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.

538 U.S. at 620 (emphasis added). This is another circumstance where this Court's reference to "breathing room" refers not to an independent method of analysis, but rather to one component of the rationale for requiring a narrowly tailored fraudulent fundraising statute which places the burden on the state to show every element of the particularized offense. *Id.*, at 620.

Moreover, fraud *is* one of the "historic and traditional categories" which this Court has recognized as a "well-defined and narrowly limited classes of speech, the prevention and punishment of which ha[s] never been thought to raise any Constitutional problem." *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010), *quoting Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

The government also cites, Pet. Br. at 26-27, *Brown v. Hartlage*, 456 U.S. 45 (1982), a case where the issue involved "whether the First Amendment, as applied to the States through the Fourteenth Amendment, prohibits a State from declaring an election void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that 'fixed by law.'" *Id.*, at 46. While the campaign promise was false in the sense that it was one that would be beyond the authority of the speaker to implement, even if elected to the county commissioner position he was seeking, there was nothing in the record to suggest

that he was aware of this limitation. *Id.*, at 61-62. Furthermore, the Court noted that in the context of political campaigns, restrictions on candidates' speech to the voters must "be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression." *Id.*, at 53-54.

It is important to note that *Hartlage* did not involve a facial challenge to a statute, but instead involved the application of a Kentucky statute prohibiting a candidate from either offering material benefit to voters in order to receive their votes or receiving such consideration from voters. *Id.*, at 54. The statute itself did not address speech as such, but rather corruption—whether involving true statements, false statements, or no statements at all. It statute did not require any element of falsity, as the *quid pro quo* of a bribe requires no false statements. Thus the statute in question concerned a harm distinct from the possibility that an audience might believe a politician's speech. The distinct element of political corruption was clear and tangible. But even then, because of more general First Amendment concerns, the statute could not constitutionally be applied to that candidate's general campaign promises —even those which *could not* have been carried out. *Id.*, at 56-57.

Despite the government's reference to cases involving liability for baseless lawsuits, Pet. Br. at 27-28, that line of cases actually contradicts the premise that mere falsity in statements alone is sufficient to strip that expression of constitutional protection. In *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461

U.S. 731, 743 (1983), this Court analogized the filing of baseless lawsuits with making false statements. *BE&K Const. V. N.L.R.B.*, 536 U.S. 526 (2002), clarified this analogy by stating that both instances require something more than just falsity or baselessness in order to lose presumptive constitutional protection.

> We have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own. ... [O]ur holdings limited regulation to suits that were both objectively baseless and subjectively motivated by an unlawful purpose.

536 U.S. at 531. Again, the concept of "breathing space" for public discourse is *one* reason for the requirement for showing something more than mere falsity be required. But the defendant's obvious cost in and other burdens in responding to a baseless lawsuit provide the obvious falsity-plus factor permitted sanctions against frivolous litigation behavior.

Other examples used by the government are equally unavailing. 18 U.S.C. § 1001(a) criminalizes making fraudulent statements or representations of material facts "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." The government cites, Pet. Br. at 30, *United States v. Gilliland*, 312 U.S. 86 (1941), for the purpose of the statute, and the basis for the 1934 amendment, defining more broadly the types of harm from which Congress intended to protect the federal government.

> The amendment eliminated the words "cheating and swindling" and broadened the provision so as to leave no adequate basis for the limited construction which had previously obtained. The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States." In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.

312 U.S. at 93.

Thus, there was a clear element of specific harm contemplated by the statute. Moreover, a false statement or representation must be material and made to the federal government only within specified contexts. Unlike 18 U.S.C. § 704(b), 18 U.S.C. § 1001's reach does not extend beyond protection from clear harm that occurs from the making of false statements and representations of material fact. Here again, falsity alone is not enough.

The same element of materiality (of a falsehood) is also a requisite element for the federal offense of perjury. *See*, 18 U.S.C. § 1623(a); *Johnson v. United States*, 520 U.S. 461, 465 (1997)("There is no doubt that materiality is an element of perjury under § 1623"). Moreover, perjury involves the palpable and

obvious harm of interference with the administration of justice. *In re Michael*, 326 U.S. 224, 227-28 (1945). It also threatens the structure of the integrity of the judicial system. *United States v. Dunnigan*, 507 U.S. 87 (1993).

> To uphold the integrity of our trial system, we have said that the constitutionality of perjury statutes is unquestioned. The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat. All testimony, from third-party witnesses and the accused, has greater value because of the witness' oath and the obligations or penalties attendant to it.

507 U.S. at 97. Once again, falsity alone proves insufficient for the criminalization of speech. There must be another element or elements.

3. Even Impersonation Statutes, Which Most Closely Resemble the Stolen Valor Act, Still Require a Separate Overt Act, for a False Statement to Lose Constitutional Protection.

The same is true for impersonation. *See* 18 U.S.C. § 912.

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, docu-

> ment, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

Id. The offense has two necessary elements: 1) falsely pretending to be an officer or employee of the United States, and 2) acting "as such". *United States. v. Rosser*, 528 F.2d 652, 656 (D.C. Cir. 1976). It is insufficient for a person to merely state or pretend that he or she is "an officer or employee acting under the authority of the United States or any department agency or officer thereof." *Id.*, at 657. Some further overt act under the color of the authority inherent in the falsely claimed position is also required. *Id.* Thus, once again a false statement or representation standing alone and without more, is insufficient to constitute a violation of statute.

The impersonation statutes are the most analogous to the Stolen Valor Act in that claiming to have been the recipient of a military medal or decoration can be seen as a form of impersonation. One difference between the statutes, however, is that a violation of 18 U.S.C. § 704(b) requires nothing more than the false representation, while impersonating a federal officer and acting " as such" is likely to influence the person deceived into engaging in behavior prompted by the purported yet false, actions of the impersonator. In other words, impersonation involves an immediate and on-going lie. As such, it poses imminent dangers of the sort threatened by constitutionally unprotected incitement. In this respect, impersonation is materially different from the lie told in this case concerning the fixed and comparatively distant past. Situations under the Stolen Valor Act may involve undeserved prestige, but they are

unlikely to involve the pretense of authority over others. Those which do can be reached by other statutes, including some on which the government relies here.

The government has thus failed to show any area of law where the mere fact of making a false statement—in any and all contexts—is altogether beyond constitutional protection from a criminal statute. In each of the areas raised, there are substantial and necessary additional elements or considerations *beyond* mere factual falsity. In none of the foregoing situations does false speech involving nothing more than mere boasting, puffery, or self-aggrandizement lose its constitutional protection. Without any real harm or damage beyond the fact that hearers might believe a liar's words, there is no place for another *Chaplinsky* exception to the First Amendment's protection.

The government argues that the Stolen Valor Act should be analyzed under "breathing space" standards rather than the strict scrutiny traditionally utilized for content-based restrictions on noncommercial speech. Pet. Br. at 28 ("The Court has consistently the applied breathing space analysis—rather than strict scrutiny—to content-based restrictions on specific types of false factual statements"). In reality, however, an independent and sufficient "breathing space" analysis is a creature of the government's own invention. On the contrary, a concern for maintaining the necessary "breathing space" for public discourse is one—and *only* one—of the reasons why the most exacting scrutiny is applied to content-based regulations.

As noted *supra*, a concern for "breathing space" as one factor among many relevant to constitutional analysis is in no way incompatible with strict scrutiny. This Court has often raised the consideration is cases applying strict scrutiny and requiring compelling governmental interests (almost invariably absent). *E.g. Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010)(invalidating statutes preventing a nonprofit corporation from airing a video article concerning a political candidate within 30 days of a primary election. *Id.*, at 887, quoting *Federal Election Commission v. Wisconsin Right to Life, Inc.* (WRTL), 551 U.S. 449, 468-469 (2007) ("First Amendment freedoms need breathing space to survive"). The *Citizen's United* Court employed strict scrutiny—requiring a compelling governmental interest and narrowly tailored means. 130 S.Ct. at 898, *citing* WRTL, 551 U.S. at 464. It found nothing inconsistent between a concern for "breathing space" and strict First Amendment scrutiny. So clearly, a concern for "breathing space" is neither incompatible with strict scrutiny, nor a separate, independently sufficient alternate or lesser level of constitutional analysis.

Both the Court of Appeals majority and dissent acknowledged the need for "breathing space" to insure open and unfettered discourse. But neither adopted the concept as an exclusive method of analysis. On the contrary, the majority flatly rejected the government's approach because it would create an new and unprecedented rule placing the burden of showing constitutional protection on the speaker.

> "Congress may prohibit false statements of fact unless immunity has been carved out or

> should be carved out because the First Amendment requires protection of some falsehood in order to protect speech that matters." In other words, the government contends that there is no protection for false statements of fact unless it can be shown, in a particular case, that there should be.

617 F.3d at 1203. Such approach would render any false statement of fact, no matter how trivial or immaterial presumptively unprotected.

The government never really suggests just how its "breathing space" analysis would actually operate as an independent constitutional test—except to assert, predictably, that it will not protect the lie at issue here. It would require a case-by-case analysis without standards or any meaningful analytical framework. And thus, most ironically, the test would impose a serious chilling effect of its own: If the government can require each "false" statement to be justified on the basis of promoting some greater good, self-censorship would be the inevitable result among speakers venturing into unsettled and perhaps unpopular areas of discussion.

4. The "Breathing Space Approach" Suggested by the Government Would Require a Case-by-Case Analysis Devoid of Analytical Standards.

The Stolen Valor Act was not designed to protect against harm to individuals in the way that defamation and false light privacy laws do. It does not require fraud. Nor does it prevent interference with government processes, as do perjury laws. While

false claims to be a recipient of a military medal are common and, in some ways, similar to impersonating a federal officer, the latter is aimed at the harm created from the listener acting in a way that he or she otherwise would not but for the purported "authority" claimed by the perpetrator. This is why, unlike the Stolen Valor Act, impersonation statutes require more than then the mere false representation, but also include a requirement that an overt act commensurate with the falsely asserted position be committed.

The stated harm that 18 U.S.C. § 704(b) purports to prevent is of a qualitatively different sort. The current version of this provision was signed into law on December 20, 2006, under the title of the Stolen Valor Act of 2005, Pub. L. No. 109-437 § 1998, 120 Stat. 3226 (2006). The stated purpose and legislative findings, contained in Section 2(1) are limited to protecting "the reputation and meaning of military decorations and medals," not protecting people from fraud or other injury, or even protecting the proper functioning of government.

The fact that the focus is upon the medals themselves rather than the functioning of the Armed Forces is shown by the penalty structure for violation of the Act. Under subsection (b) violators "shall be fined under this title, imprisoned not more than six months, or both." But section (c) doubles the potential time of incarceration if the claim involves the Congressional Medal of Honor; and section (d) contains an enhanced penalty is for false claims of receipt of other medals, such as a distinguished-service cross, a Navy cross, an Air Force cross a silver star or a Purple Heart.

No explanation is given for this discrepancy in punishments. While penalties for defamation or fraud are based on the amount of harm inflicted, here the presumed rationale is that the reputation and meaning of certain medals is considered more important than others. This strongly suggests that the crucial, yet unstated basis of the Act is the offensiveness of these false claims. The protection of the reputation and meaning of these items arises no more rises to the level of a compelling governmental interest than the protection of the national flag. To be sure, this illustrates the dilemma embodied in our strong tradition of legal protection for individual expression. It comes with a hefty price tag, where the societal costs of particular expression may outweigh its benefits. *United States v. Stevens*, 130 S.Ct. 1577 (2010).

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an *ad hoc* balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id. at 1586.

Here, this Court is asked to create a new paradigm of First Amendment analysis based on nothing more than just that balancing test. Under this proposed new paradigm, the presumption of constitutionality is replaced by a presumption of unconstitutionality of utterances that are deemed false. Because of this

new presumption such statements may only fall under the protection of the Constitution if the speaker can show some benefit (presumed to be nonexistent, by definition, for false statements) extrinsic to the speech itself. What the government proposes is not even a tradition balancing test, as no showing of harm at all is required.

Even the language of the Sedition Act of 1798 was narrower and more targeted to actual arms and threats to the security of the nation than the statute now before the Court. It encompassed only "false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress of the United States, or the President of the United States, *with intent to defame...*" Sedition Act of 1798, 1 Stat. 596, § II (emphasis added).

Not surprisingly, the *Stevens* Court omitted mention of the Sedition Act of 1798 in its litany of categories of historically unprotected expression. However, under the approach urged by government here, the false statements criminalized under the Sedition Act would likely still be presumptively unprotected and illegal unless the speaker could meet the burden of demonstrating the existence of some unspecified greater value stemming from his or her expression. This, of course, severely limits speech and cannot help but create a chilling effect.

Under traditional standards, there is a presumption of constitutionality for all speech. Therefore, the burden must rest with the government to present evidence—going beyond mere falsity itself—that a proposed restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to

achieve that end." *Perry Educ. Ass'n v Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Such a showing has not been made here.

CONCLUSION

All of the foregoing First Amendment considerations present serious reasons—in addition to those asserted by the Respondent here—why a showing of falsity alone is insufficient, under the First Amendment—to permit criminal prosecution of one who utters an objectionable statement. The remedy against false claims to have received a military honor is simply more speech—by the government or by others. The attempt to protect sacrosanct military honor by laws prohibiting expression must always fail under our system of government.

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AMICUS CURIAE BRIEF

No. 11-210

In The

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INTELLECTUAL PROPERTY AMICUS BRIEF CLINIC OF THE UNIVERSITY OF NEW HAMPSHIRE SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The University of New Hampshire School of Law (UNH Law, formerly Franklin Pierce Law Center) has a long history of intellectual property expertise. UNH Law has an established Intellectual Property Amicus Brief Clinic that has filed amicus briefs for this Court as well as lower courts. With faculty guidance and student participation, the Clinic seeks to file amicus briefs that will lead to the development and predictable application of intellectual property law to promote innovation and fair competition. The Clinic submits briefs for selected cases with the hope of contributing important perspectives that might not be adequately represented by the parties.

INTRODUCTION

This case has been litigated on the assumption that the constitutionality of 18 U.S.C. § 704(b) whether as a facial matter or as applied to the false statement of fact that respondent Xavier Alvarez admits to having made, turns on whether the statement falls within a "categor[y] of speech . . . fully

[1] Counsel for each party has provided the Intellectual Property Amicus Brief Clinic of the University of New Hampshire School of Law with written consent to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members or its counsel made a monetary contribution to its preparation or submission.

outside the protection of the First Amendment." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010); *see also id.* at 1584 (stating that the categories of speech that may be restricted on the basis of content without regard to First Amendment protections "includ[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct") (citations omitted). A divided panel of the U.S. Court of Appeals for the Ninth Circuit determined that Alvarez's statement did not fall within such a category after analysis of whether the statement could be regarded as defamatory, fraudulent, or integral to criminal conduct. *See generally United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010). Concluding that it could not be so regarded, the panel applied the strict scrutiny test applicable to ordinary content-based speech restrictions and held the statute facially unconstitutional. *Id.* at 1215-18. Dissenting, Judge Bybee voted to uphold the statute, both facially and as applied, on the ground that false statements of fact such as those proscribed by § 704(b) constitute a category of speech that falls outside of the First Amendment's protection "except in a limited set of contexts where such protection is necessary 'to protect speech that matters.'" *Id.* at 1218-19 (Bybee, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

The undersigned do not address the issues that divided the Ninth Circuit panel. Rather, the undersigned call to the Court's attention an alternative, narrower line of analysis that bears on the constitutional validity of applying § 704(b) to those, such as

Alvarez, who falsely claim to have received the Congressional Medal of Honor. The undersigned submit this brief solely to assist the Court in making a fully informed assessment of the question presented; they recognize that the government did not defend the statute on the narrow basis advanced, and they take no position on the proper disposition of this particular case.

SUMMARY OF THE ARGUMENT

Prohibiting false association or affiliation is an objective of trademark law, which imposes civil and criminal penalties on those who infringe valid trademarks. The phrase "Congressional Medal of Honor" may plausibly be understood to perform a trademark function by distinguishing recipients of the nation's highest military honor – those who compose the federally-chartered collective organization known as the Congressional Medal of Honor Society – from non-recipients. Accordingly, the phrase "Congressional Medal of Honor" may function as a valid collective membership mark, the infringement of which may constitutionally be regulated by measures that satisfy the variants of intermediate First Amendment scrutiny employed in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 535-41 (1987) (rejecting a First Amendment challenge to a federal statute authorizing the United States Olympic Committee to prohibit certain commercial

and promotional uses of the Committee's trademarks, including the word "Olympic").

If § 704(b) were construed to be a measure regulating, inter alia, the infringement of the "Congressional Medal of Honor" collective membership mark, the constitutionality of its application to those who falsely claim to have been awarded the Medal could be assessed under the analysis prescribed in *San Francisco Arts & Athletics*.[2] Under that analysis, the First Amendment permits the prohibition of falsely claiming to have been awarded the Medal. Taking such a narrow decisional tack would obviate any need to answer the broad and ramified question of whether false statements of fact are categorically beyond the reach of the First Amendment except in circumstances where they are necessary to protect speech that matters. In any event, in deciding the question presented, the Court should be aware of the potential applicability of trademark law and consider the potential effects of its ruling on such law.

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[2] The undersigned recognize that the parties dispute whether 18 U.S.C. § 704(b) contains a scienter requirement, and that additional constitutional questions could arise if the statute were read not to contain such a requirement. The undersigned do not take a position on this dispute; instead, they confine their argument to how the constitutionality of § 704(b) should be assessed for First Amendment purposes if the statute were treated as a measure prohibiting, inter alia, infringement of the collective membership mark.

ARGUMENT

I. 18 U.S.C. § 704(b) Bans False Statements of Association or Affiliation

On May 5, 2008, Xavier Alvarez pled guilty to one count of falsely claiming to have received the Congressional Medal of Honor, the nation's highest military honor. The charge arose out of a public statement that he made almost a year earlier, when, introducing himself as a newly-elected member of the local water board in Pomona, California, he claimed to be a Medal recipient. In truth, Alvarez is not a recipient of the Medal and has never served in the U.S. Armed Forces. Alvarez's oral claim to be one of an elite group of combat heroes creates exactly the sort of false association that Congress sought to curtail in the 2006 amendment of 18 U.S.C. § 704, known as the Stolen Valor Act, codified in pertinent part at 18 U.S.C. §§ 704(b)-(c).[3] Until the 2006 amendment, § 704 prohibited falsely identifying oneself with Medal recipients but only insofar as such conduct took the form of wearing or displaying an actual Medal or colorable imitation of the Medal. Supporters of the amendment sought to extend the reach of the criminal statute to encompass knowing false verbal or written representations about one's receipt of the

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[3] Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), (3), 120 Stat. 3266, 3266 (2006). The Act covers false claims with regard to other military medals and decorations in addition to the Congressional Medal of Honor.

Medal, in order to close a perceived gap in the statutory scheme.[4]

Prior to passage of the Act, Congress estimated that over 250 imposters existed who were beyond the reach of the law because their false claims of receiving the Medal were purely oral or written in nature.[5] In fact, an additional count against Alvarez charged him with making the same false oral representation in a meeting with the Pomona Police Officer's Association in November 2005 when he was seeking the group's endorsement of his candidacy for mayor of Pomona.[6] The second count was dismissed, however,

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[4] One of the authors of the legislation, U.S. Representative John Salazar, offered the following observations about the proposed amendment:

> Current law basically allows Federal law enforcement to prosecute individuals who physically wear medals on their person. The problem has been occurring where individuals are claiming to have earned these medals and there is no way for authorities to be able to prosecute these individuals. These frauds and these phonies have diminished the meaning and the honor of the recognitions received by our military heroes.
>
> In addition to diminishing the meaning, on several occasions phonies have used their stature as a decorated war hero to gain credibility that allows them to commit more serious frauds.

152 CONG. REC. H8821 (2006) (statement of Rep. Salazar).

[5] *Id.* at 8820.

[6] *See Alvarez to Face More Charges*, SAN GABRIEL VALLEY TRIBUNE, Jan. 13, 2008; First Superseding Information, *United States v. Alvarez*, No. 07-0135(A)-ER (C.D. Cal. Feb. 20, 2008).

apparently because Alvarez's November 2005 statement was made before the amendment's 2006 effective date.[7] Passage of the Act put false claimants such as Alvarez within the reach of federal prosecutors.

II. Trademark Law Regulates False Statements of Association or Affiliation

Generally, a trademark functions to distinguish the goods or services of one commercial entity from those of another. *See Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 412 (1916) (pre-Lanham Act decision).[8] Judicial enforcement of trademark rights serves a dual purpose, i.e., protection of consumers from deception in the marketplace and protection of the business goodwill engendered by a merchant's use of a particular mark to sell his goods or advertise his services. *See id.* at 412-13. The federal Lanham Act protects unregistered and federally-registered marks from infringement which occurs when one party uses a commercial designation in such a way as to create a likelihood of confusion with regard to its association or affiliation with another or with regard to the origin of their respective goods or services.[9] Likelihood of

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[7] Judgment and Commitment, *United States v. Alvarez*, No. 07-0135(A)-ER (C.D. Cal. July 23, 2008).

[8] *See also* 15 U.S.C. § 1127 (2006) (Lanham Act definition of "mark").

[9] *See* 15 U.S.C. § 1114 (2006) (providing a cause of action for infringement of federally-registered marks); 15 U.S.C. § 1125(a)(1)(A) (2006) (providing a cause of action for infringement of unregistered

(Continued on following page)

confusion is assessed in relation to "ordinary purchasers, buying with ordinary caution," *McLean v. Fleming*, 96 U.S. 245, 251 (1877), unless the mark in issue is a collective membership mark, a type of mark that designates only membership in a specific group and does not involve purchasers of goods or services, *Carefirst of Maryland, Inc. v. FirstHealth of the Carolinas, Inc.*, 77 U.S.P.Q.2d 1492, 1512 (T.T.A.B. 2005). In the latter case, likelihood of confusion is measured by reference to "relevant persons," i.e., "those persons or groups of persons for whose benefit the membership mark is displayed." *See id.* at 1513. The Lanham Act provides civil remedies for trademark infringement but criminal penalties for the most egregious form of infringement are also available at the federal level.[10]

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marks and unfair competition). Courts analyze likelihood of confusion by examining and balancing a variety of factors including, inter alia, the strength of the plaintiff's mark, the similarity of the parties' marks and their respective goods and services, evidence of actual confusion in the marketplace, and the defendant's intent. *See generally* 4 J. THOMAS MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:19 (4th ed. 2011).

[10] 18 U.S.C. § 2320 (2000 & Supp. 2011). *See* Joint Statement on Trademark Counterfeiting Legislation, 130 CONG. REC. 31,675 (1984) ("[A] counterfeit mark is the most egregious example of a mark that is 'likely to cause confusion.'").

III. The Phrase "Congressional Medal of Honor" Performs a Trademark Function

A. "Congressional Medal of Honor" Distinguishes Recipients of the Nation's Highest Military Honor From Non-Recipients

Congress uses the phrase "Congressional Medal of Honor" to designate members of the U.S. armed services who, having distinguished themselves through conspicuous gallantry and disregard for personal safety while engaged in conflict on behalf of the nation's military, receive the nation's highest military award. The actual title of the honor, awarded by the President in the name of Congress, is "Medal of Honor"; the award is made under separate statutory authorization to members of each branch of the armed services.[11] Section 704(c)(2) of Title 18 utilizes the phrase, "Congressional Medal of Honor," as a composite reference to refer to the Medal as awarded to members of all branches of the armed services, or to duplicates or replacements of the Medal.[12] In the legislative history of the Stolen Valor Act, Congress acknowledged that Congressional Medal of Honor impersonators are motivated by a desire to identify themselves with the heroic characteristics of actual recipients but explicitly recognized the damaging nature

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[11] *See* 10 U.S.C. §§ 3741, 6241 (1999) (Army, naval services); 10 U.S.C. §§ 8741 (1998) (Air Force); 14 U.S.C. § 491 (1996) (Coast Guard).

[12] 18 U.S.C. § 704(c)(2) (1996 & Supp. 2011).

of such conduct.[13] Whether done to perpetrate fraudulent activity or simply to aggrandize oneself in the eyes of others, false identification with this distinguished group "denigrates" and "dishonors" the collective members of the group; Congress sought to return to Medal recipients "the dignity and respect taken by those who have stolen it" by enacting the Stolen Valor Act.[14]

B. Recipients of the Medal Compose a Collective Organization, the Congressional Medal of Honor Society

The Congressional Medal of Honor Society was organized in 1948 by a group of recipients of the Medal

> for the purpose of providing a common ground on which all recipients of the Congressional Medal of Honor may meet to preserve the dignity of the Nation's highest award; to protect the medal and the holders thereof from exploitation or other improper action; to provide assistance as may be needed by holders of the medal and their dependents; to bring the medal to the attention of the public wherever possible to inspire the youth of the Nation; and to serve our country

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[13] 152 CONG REC. H8820 (2006).

[14] *Id.* at 8820-21.

> in all proper ways in peace as its holders did in time of war.[15]

In 1958, the Society became a Title 36 congressionally-chartered corporation and its purposes are recited in the statutory charter, including, inter alia, "to protect *the name* of the medal . . . from exploitation"[16] and "to protect, uphold, and preserve the dignity" of the Medal at all times.[17] Membership in the Society is restricted to recipients of the Medal and no honorary memberships are allowed.[18] The Society possesses the usual corporate powers, but the Society, its directors and officers, are restricted by statute from participating in any political activity.[19] Today, the Society provides a platform for its members to engage in educational outreach, fundraising for scholarships, and a variety of other initiatives in furtherance of the Society's purposes.[20]

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[15] H. COMM. ON THE JUDICIARY, H.R. Rep. No. 2322, at 11 (1958).

[16] 36 U.S.C. § 40502(3) (1999) (emphasis added).

[17] *Id.* § 40502(2).

[18] *Id.* § 40503(a).

[19] *Id.* §§ 40505-06.

[20] *See* CONGRESSIONAL MEDAL OF HONOR SOCIETY, http://www.cmohs.org (last visited Dec. 2, 2011). The Society's activities in this regard are aided and supported by the Congressional Medal of Honor Foundation, a charitable corporation founded by the Society. *See* CONGRESSIONAL MEDAL OF HONOR FOUNDATION, http://www.cmohfoundation.org (last visited Dec. 2, 2011).

C. The Phrase "Congressional Medal of Honor" Functions as a Collective Membership Mark

The federal government has reserved use of the phrase, "Congressional Medal of Honor," as an identifier for recipients of the Medal so that they may designate their status as recipients and as members of the Society. Under the federal Lanham Act, governmental entities may own, register, and enforce trademarks, including collective membership marks.[21] The owner of a collective membership mark need not be a collective organization itself but may form a collective for the benefit of specific individuals, just as the federal government has done in chartering the Society for the benefit of Medal recipients.[22] *See In re Stencil*

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[21] 15 U.S.C. § 1054 (2006) (Lanham Act authorization for "nations, States, municipalities, and the like" to register collective marks). Examples of federally-registered collective membership marks belonging to a department or agency of the U.S. government include: "SEAL," U.S. Reg. No. 3,285,473, indicating membership in an organization that develops and executes military missions involving special operations strategy, doctrine, and tactics, registered by the Department of the Navy; "MEDICAL RESERVE CORPS" and Design, U.S. Reg. No. 3,007,633, indicating membership in a group of service-providers who have an established group of practicing and retired physicians, nurses, and other health professionals to act in a coordinated manner in times of local emergencies, registered by the Office of the Surgeon General; "AIRBORNE A A" and design, U.S. Reg. No. 2,487,176, indicating membership in the U.S. Army 82nd Airborne Division, registered by the Department of the Army.

[22] Congress has chartered other collective organizations for the benefit of recipients and their family members of other military medals referenced in 18 U.S.C. § 704, specifically medals

(Continued on following page)

Aero Engineering Corp., 170 U.S.P.Q. 292, 293 (T.T.A.B. 1971). The owner need only exercise legitimate control over the group and its members' use of the mark. *Id.* at 293. Congress asserts control over the Society's use of the phrase "Congressional Medal of Honor" by chartering the Society for purposes that include guarding against exploitation of the name of the Medal and protecting and preserving the reputation of the Medal. Further, Congress controls use of the phrase for self-identification purposes by restricting membership in the collective to actual Medal recipients.

Collective membership marks differ from traditional trademarks in that they do not indicate the commercial origin of goods or services; they serve solely to indicate membership in a group, such as a fraternal society, a cooperative, or a trade union. *See Zimmerman v. National Association of Realtors*, 70 U.S.P.Q.2d 1425, 1428 n.6 (T.T.A.B. 2004) (citing *Ex Parte The Supreme Shrine of the Order of the White Shrine of Jerusalem*, 109 U.S.P.Q. 248, 249-50 (Comm'r. Pat. 1956)). In this case, the phrase "Congressional Medal of Honor" operates as a collective

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referenced in § 704(d) for which misrepresentation results in enhanced penalties. The Legion of Valor of the United States of America, Inc., is authorized to extend membership to the recipients, their parents and lineal descendants, of the Distinguished Service Cross, the Navy Cross, the Air Force Cross, and the Medal of Honor. 36 U.S.C. § 130303 (1999). Similarly, the Military Order of the Purple Heart of the United States of America, Inc., may extend membership to the recipients of the Purple Heart Medal and their immediate families. 36 U.S.C. § 140503 (1999 & Supp. 2011).

membership mark by designating the only individuals eligible to be members of the Congressional Medal of Honor Society. Although collective membership marks may be federally registered, they need not be in order to be enforceable. *See The National Board of the Young Women's Christian Association of the U.S.A. v. Young Women's Christian Association of Charleston, South Carolina*, 335 F.Supp. 615, 623 (D.C.S.C. 1971). Section 704(b) of Title 18 provides a mechanism for enforcing rights in the phrase "Congressional Medal of Honor" against false association or affiliation without any requirement that the phrase be federally registered.[23]

IV. The First Amendment Permits Congress to Prohibit Infringement of the "Congressional Medal of Honor" Collective Membership Mark

If the Court were to accept the argument that § 704(b) functions as a trademark statute prohibiting infringement of the "Congressional Medal of Honor" collective membership mark, it would not need to decide the broad and ramified question of whether

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[23] Congress has authorized criminal penalties for counterfeiting of the unregistered marks of another congressionally chartered organization, the U.S. Olympic Committee. *See* 18 U.S.C. § 2320(e)(1)(B) (2000 & Supp. 2011) (unauthorized use of marks identical to or substantially indistinguishable from trademarks listed in 36 U.S.C. § 220506(a) (1999), including the word "Olympic," constitutes criminal counterfeiting without requiring proof of federal registration).

false statements of fact are categorically beyond the reach of the First Amendment except when necessary to protect speech that matters. Rather, the Court could uphold the constitutionality of the statute's application to those, such as Alvarez, who falsely claim to have been awarded the Congressional Medal of Honor under the First Amendment analysis prescribed in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 535-41 (1987).[24]

San Francisco Arts & Athletics involved a First Amendment challenge to the constitutionality of a federal statute that granted the United States Olympic Committee (USOC) the right to prohibit certain commercial and promotional uses of the word "Olympic." *See id.* at 532-41. Exercising that right, the USOC obtained an injunction prohibiting the petitioner from promoting an athletic event under the name "Gay Olympic Games." *Id.* at 525-27. Petitioner challenged the injunction before this Court, arguing in relevant part that the statute violated the First Amendment by authorizing the USOC to prohibit use of the word "Olympic" without showing that such use was likely to confuse the public.[25] *Id.* at 532.

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[24] The undersigned reiterate that their argument addresses only the First Amendment implications of 18 U.S.C. § 704(b). *See supra* note 2.

[25] Like its civil counterpart, the criminal statute prohibiting counterfeiting of the U.S. Olympic Committee's trademarks does

(Continued on following page)

In assessing petitioner's argument, the Court concluded that the constitutionality of the infringement on petitioner's commercial and promotional speech rights worked by the statute should be assessed under variants of intermediate First Amendment scrutiny. *See id.* at 535-41. Insofar as petitioner was precluded from engaging in commercial speech, the Court applied the test authorized in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980) (a restriction on non-misleading commercial speech is valid if the government's interest in the restriction is substantial, if the restriction directly advances the government's asserted interest, and if it is no more extensive than necessary to serve the interest). *See San Francisco Arts & Athletics*, 483 U.S. at 537 n.16. Insofar as petitioner was precluded from engaging in non-commercial speech, the Court applied the balancing test applicable to measures that incidentally restrict speech while seeking to further substantial non-speech purposes prescribed in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *San Francisco Arts & Athletics*, 483 U.S. at 537 n.16. Explaining that the application of these two balancing tests to the facts of the case was "substantially similar," *id.*, the Court concluded that the challenged statute passed constitutional muster. *See id.* at 537-41.

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not require proof of a likelihood of confusion. *See* 18 U.S.C. § 2320(e)(1)(B) (2000 & Supp. 2011).

If the Court were to read § 704(b) as a trademark infringement statute similar to the statute upheld against a First Amendment challenge in *San Francisco Arts & Athletics*, and if the Court were to follow the lines of reasoning adopted and applied in that case, it could uphold against a First Amendment challenge the statute's prohibition on falsely claiming to have been awarded the Congressional Medal of Honor. Insofar as the statute prohibits one from falsely making such a claim in the course of commercial self-promotion, the infringement would constitute a lawful restriction on false or misleading commercial speech. *See Central Hudson*, 447 U.S. at 566. Insofar as the statute prohibits one from making such a claim in a non-commercial context, certainly the incidental restriction on one's ability to tell this particular lie could not possibly outweigh Congress's strong interest in preserving the dignity of the Nation's highest military honor. *See O'Brien*, 391 U.S. at 377.

CONCLUSION

In summary, the undersigned do not take the position that the Court should vacate the Ninth Circuit's judgment and uphold the constitutionality of Alvarez's conviction under a trademark infringement analysis. Rather, the undersigned wish to apprise the Court of the potential applicability of such an analysis as it considers the question presented, and, more generally, of their view that resolution of this case does not necessarily require the Court to decide

whether false statements of fact are invisible to the First Amendment except in circumstances where they are necessary to protect speech that matters.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECEIVED

No. 11-210

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

XAVIER ALVAREZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE LEGION OF VALOR OF THE UNITED STATES AND THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Section 704(b) of Title 18, United States Code, makes it a crime when anyone "falsely represents himself or herself, * * * verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

The question presented is whether 18 U. S. C. § 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

XAVIER ALVAREZ,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The Legion of Valor of the United States of America, Inc.[1] was founded in 1890 by Civil and Indian Wars recipients of the Medal of Honor. See Legion of Valor, Legion of Valor History, http://www.legionofvalor.com/history.php. The organization was chartered by Congress in 1955, see Pub. L. 84-224, 69 Stat. 486, and includes only Medal of Honor, Distinguished Service Cross, Navy Cross, and Air Force Cross recipients. See 36 U. S. C. § 130303.

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission.

One of the objectives of the Legion of Valor is to "[c]herish the memories of the valiant deeds for which the Medal of Honor, Distinguished Service Cross, Navy Cross, and the Air Force Cross are the insignia." Legion of Valor History, *supra*. The decision of the Court of Appeals for the Ninth Circuit in this case would allow frauds who have not earned these honors to claim them with impunity, contrary to the purpose of the Legion of Valor and the interests of its members.

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision of the Court of Appeals for the Ninth Circuit in this case is an expansive view of the First Amendment, going far beyond what is needed to protect free speech and endangering the ability of government to nip potential frauds in the bud. It is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The Stolen Valor Act, Pub. L. 109-437, 120 Stat. 3266, was enacted in 2006, passing the Senate by unanimous consent, 152 Cong. Rec. 17549 (2006), and the House on a motion requiring a two-thirds vote. See *id.*, at 22577, col. 3 (actual vote not recorded). The bill was supported by members across the political spectrum, including Congressmen Sensenbrenner and Conyers. See *id.*, at 22575, col. 1 (statement of Mr. Conyers). No one spoke against the bill in either house. The bill amended a preexisting statute against

falsely wearing military medals, extending it to false claims of having been awarded a medal. See 18 U. S. C. § 704(b).

Xavier Alvarez was elected to a California water district board in 2007. Soon afterward, at a public meeting, he made a number of extravagant claims about his military record, including award of the Congressional Medal of Honor. In fact, he has never served in the military at all. See *United States* v. *Alvarez*, 617 F. 3d 1198, 1200-1201 (CA9 2010). Following investigation by the FBI, he was indicted for violation of the Stolen Valor Act. The District Court rejected his constitutional challenge to the Act. He pleaded guilty, reserving the right to appeal the constitutional challenge, and was sentenced to three years probation, a $5000 fine, and 416 hours of community service. See *id.*, at 1201.

A majority of a divided panel of the Court of Appeals declared the Act to be unconstitutional. See *id.*, at 1218. Judge Bybee dissented. See *ibid.* The full court denied rehearing en banc, *United States* v. *Alvarez*, 638 F. 3d 666 (2011), seven judges dissenting. See *id.*, at 677.

Two other District Courts have come to opposite conclusions on this issue. See *United States* v. *Strandlof*, 746 F. Supp. 2d 1183 (Colo. 2010) (unconstitutional); *United States* v. *Robbins*, 759 F. Supp. 2d 815 (WD Va. 2011) (constitutional). Appeals in both cases are pending as of this writing. This Court granted certiorari in the present case on October 17, 2011.

SUMMARY OF ARGUMENT

The Stolen Valor Act should be understood as prohibiting false statements made with knowledge that they are false and with an intent to deceive. This law is

not about honest mistakes, fiction, theater, or parody. Simply put, this law is about lies. Along with the wording of the statute, the rule of *Morissette* v. *United States* supports this interpretation, and there is nothing pointing to the contrary.

The Act supports an important government interest. A fraud such as Alvarez may or may not do any tangible harm with his false claims, but the collective harm caused by such frauds is real, even if intangible. Medals of valor are a kind of reputational currency issued by the government, and fraudulent representations are analogous to counterfeiting. The honor due the genuine heroes is diminished and subject to suspicion by the large number of fakers. Military morale is enhanced by a system of recognition that gives credit where and only where it is due, and widespread fraud diminishes the integrity of that system. The existence of a criminal statute facilitates the investigation of frauds. Alvarez was exposed by an FBI investigation, but without the statute there would have been nothing for the FBI to investigate.

The Act is viewpoint neutral. A person may represent that he has won a medal to oppose government policy, to support it, or to take no position at all. As illustrated by this Court's decision involving a similar law on the wearing of uniforms, the government may regulate in this area as long as it does not discriminate between viewpoints.

There is generally no constitutional right to lie. Where constitutional protection of lies exists, it is merely incidental to protecting other speech such as opinion or honest mistakes. The passage of *United States* v. *Stevens* relied on by the Court of Appeals majority should not be understood to hold that constitutional regulation of the content of speech is limited to the few, narrow categories actually regulated histori-

cally. Such a limitation would overturn large areas of settled law.

Unlike other parts of the Bill of Rights, there is no settled law we can look to at the time of adoption to tell us what was accepted practice then. The law of free speech was still a work in progress at that time. Looking at historical practice in the colonial and founding eras, we see that regulation of falsehoods was broader than just the law of defamation, further negating the notion that the limited categories listed in *Stevens* are the only lies that can be prohibited.

Congress and the States have prohibited lies without a showing of individualized, tangible harm in many statutes. In *United States* v. *Wells*, this Court interpreted a law against making false statements to a financial institution to have no requirement of materiality, without any indication this would raise a constitutional problem. Many states have laws against impersonation of officers with no requirement of any tangible harm or further act.

Some kind of state interest requirement might be deemed necessary to prevent regulation of the trivial or personal lies noted in Judge Kozinski's opinion. However, all federal statutes regulating speech, or anything else, must have a connection to one of the enumerated powers to be constitutional, so this aspect of the problem could be deferred to a case where a state statute is at issue. The case may never arise, as democracy and not litigation is the best defense against excessive government intrusion. If an explicit standard is deemed necessary in this case, the "legitimate state interest" noted in *Gertz* v. *Robert Welch, Inc.* should be adopted. This standard is well known to courts in the context of equal protection law, and it provides the protection needed (if any is needed) to protect against Judge Kozinski's nightmare scenario.

Whatever standard of government interest might be adopted, this statute clearly passes. The panel majority in this case conceded that 18 U. S. C. § 704 serves a compelling government interest, the highest standard, and the Ninth Circuit so held in another case upholding another subdivision of the same statute.

ARGUMENT

I. The Act should be interpreted as including a mental element of knowledge of the falsehood and intent to deceive.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 553 U. S. 285, 293 (2008). That is also a good place to begin in this case, whether the attack is strictly characterized as "overbreadth" or not.

The statute applies to "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . ." 18 U. S. C. § 704(b). As the Government has explained, from the word "represents" it is clear that Congress did not intend to prohibit fictional statements not intended to deceive, such as theatrical performances or parodies. See Brief for the United States 17.

Along with the wording of the Act, there is the more general principle that the legislature is presumed to intend an element of *mens rea* when it creates a new crime, even when the statute includes no wording to that effect.

> "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning

> mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.[9] As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Morissette* v. *United States*, 342 U. S. 246, 251-252 (1952).

The most common mental element is intent, following from the very basic belief that intentional harm is far more blameworthy than accidental harm. Footnote 9 in the passage above quotes Justice Holmes, "Even a dog distinguishes between being stumbled over and being kicked." Criminal intent may, in some circumstances, be synonymous with knowledge. See *id.*, at 271. Morissette intended to take the shell casings, but he was not guilty if he believed them to be abandoned property. See *id.*, at 276.

The principle of *Morissette* has been invoked repeatedly by this Court to supply a *mens rea* element where none is in the statute. For example, in *Staples* v. *United States*, 511 U. S. 600, 603 (1994), the defendant possessed a rifle that is normally semiautomatic but had been modified to fully automatic, and hence it was a "machine gun" requiring registration. The statute "is silent concerning the *mens rea* required for a violation . . . . Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." *Id.*, at 605 (citing *Morissette*, *supra*, and *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436-437 (1978)). Relying on these

precedents, the Court found a knowledge requirement to be implied. See *id.*, at 619-620.

For the medals of valor that Congress was primarily concerned with, see 18 U. S. C. § 704(c) and (d), it is highly unlikely that any mentally sound person could be mistaken whether he earned them. However, the base statute, *id.*, subd. (b), extends to all decorations, and a great many are awarded for achievements of far less moment. A veteran with many rows of ribbons might make an honest mistake as to one of the minor ones, and the statute should not be interpreted to criminalize a mistake. Similarly, a person who suffers from schizophrenia with grandiose delusions might genuinely believe he has been awarded the Medal of Honor. While he would probably qualify for the insanity defense, see 18 U. S. C. § 17, such delusions can also serve to negate the *mens rea* of the crime, and the statute should not be construed to reach this situation.

This interpretation is reinforced by the findings in the enacting statute. Congress specifically referred to fraudulent claims in enacting the statute. See Pub. L. 109-437, § 2, 120 Stat. 3266 (2006). This Court has noted the problems with "judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I," and other "extrinsic materials." *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 568 (2005). These findings, however, are not extrinsic, and they *have* been through the Article I enactment process. While the prefatory language of an enactment cannot limit or expand the operative language, it can resolve ambiguity. See *District of Columbia* v. *Heller*, 554 U. S. 570, 577-578 (2008). Under *Morissette* and *Staples*, courts presume the legislature intended to include a *mens rea* requirement absent an indication to the

contrary. The references to fraud in the findings in § 2 are an indication to the affirmative.

The statute in this case is not about making statements that happen to be literally false. It is narrower and more important than that. This statute prohibits false statements made with the knowledge that they are false and with the intent to deceive. In plain English, this statute punishes lies.

II. The Stolen Valor Act serves an important government interest and is viewpoint neutral.

A. Real Harm.

Defendant Alvarez claims that he "harmed no one" and did not "obtain any tangible or intangible benefits" through his lies. See Brief in Opposition 3. The Court of Appeals majority was also dismissive of the harm caused by the fakers. See *Alvarez*, 617 F. 3d, at 1217. But the legitimate government interest in preventing harm is not limited to preventing tangible harm. Nor is it limited to punishing successful attempts to obtain "tangible or intangible benefits." Alvarez did attempt to obtain intangible benefits of esteem he did not deserve, and the criminal law has always punished unsuccessful attempts as well as successful ones.

A medal of valor does not directly confer any tangible benefit. It has nearly zero intrinsic value, being only a piece of nonprecious metal and cloth. The value lies in what it represents and the esteem of one's fellow citizens for what it represents.

The Brief for the United States 2-6 traces the history of military medals. That discussion need not be repeated here. We will focus on the intangible but very real harm caused by those who falsely claim them.

The title of the Act comes from the 1998 book Stolen Valor by B. G. Burkett and Glenna Whitley. See 152 Cong. Rec. 22575, col. 3 (2006) (statement of Mr. Salazar).

> "The authors show that killers have fooled the most astute prosecutors and gotten away with murder. They show phony heroes who have become the object of national award-winning documentaries on national network television. They show liars and fabricators who have flooded major publishing houses with false tales of heroism which have become best-selling biographies.
>
> "Not only do the authors show the price of the myth has been enormous for society, but they spotlight how it has severely denigrated the service, patriotism, and gallantry of the best warriors America's ever produced." *Ibid.*

The fakers noted by Burkett and Whitley include some who used their false claims to obtain tangible benefits and some who did not. They include Circuit Judge Michael O'Brien of Illinois, who hung a fake medal in his chambers, included a story of his heroism in a pamphlet distributed there, applied for special license plates, and was scheduled to speak at a veterans' rally in a gubernatorial campaign before he was finally exposed. Burkett & Whitley, *supra*, at 360-361. Another faker who caused both tangible and intangible harm is Boyer Westover, whose fake tales of heroism produced a glowing story in a newspaper, a job as a researcher for a publisher, and even a seat on the board of *amicus* Legion of Valor. *Id.*, at 367-369.

The Court of Appeals majority demands proof that these fakes cause harm to the integrity of the military medal system, see 617 F. 3d, at 1216, but this Court has rejected the premise that quantifiable proof is required

in the First Amendment area. "There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 129 S. Ct. 1800, 1813, 173 L. Ed. 2d 738, 753 (2009). The harmful effect of widespread fakery regarding military medals is another.

The crime at issue here is in some ways analogous to counterfeiting. Paper money is not exchangeable for gold or silver any more. Bills circulate until worn out and are replaced with newly printed bills. One might say that a counterfeiter so skilled that his counterfeit is never discovered does no harm. The person he passes his fake to passes it to someone else and buys actual goods with it, and so on. Yet every real bill is worth a little less for the existence of a fake. The existence of fakes causes real bills to be examined with some suspicion upon tender. We have all experienced tendering a bill and seeing the cashier mark it with a counterfeit detection pen. There is a trace of insult there, however small.

Military medals are a kind of government-issued currency of valor. They represent an official recognition of exemplary service which most people in this country honor and respect. There is a loss, however intangible, when fakers claim honors they have not earned, especially when they can do so with impunity. Will a newspaper embarrassed by a story on a hero who turned out to be a fake run another on a real hero? It might, with thorough checking, or it might just pass. Congress was well aware of this dilution effect when it passed the Act. "The FBI estimates that for every legitimate Navy SEAL team member, there are roughly 300 imposters. Moreover, there are roughly only 124 living recipients of the Medal of Honor, yet more than twice as many falsely claim to have received it." 152

Cong. Rec. 22575, col. 1 (statement of Mr. Sensenbrenner).

Defendant notes that he has paid a price for his own fakery in loss of reputation. "Even as his case was proceeding through the trial court, he was pilloried in the community and in the press, labeled an 'idiot,' 'jerk,' and worse." Brief in Opposition 3-4. Good. Loss of reputation is indeed a consequence of being proven a fake, as it should be. It will very often be a greater loss than the minor punishment imposed under the statute. Yet the existence of the statute may be necessary to provide an authoritative determination that the faker is indeed fake. Not all liars are as outrageous and obvious as Alvarez. Without a federal statute against fakery in force, there is nothing for the FBI to investigate. A misdemeanor conviction, even with a slap-on-the-wrist sentence, is an official adjudication of the fakery, and as such it is valuable in itself as public notice.

Sometimes the loss of reputation is posthumous. Officers of *amicus* Legion of Valor sometimes have the distasteful duty to inform the families of recently deceased service members that their loved ones were not the heroes they claimed to be. The pain of grief is compounded by the revelation that the deceased family member was a fraud. This is a kind of harm Congress probably did not anticipate, but it is real and poignant. To the extent such incidents can be deterred by the knowledge that a fraud can be officially investigated and exposed in his lifetime, the pain can be avoided.

As the Government has explained, the integrity of the military awards system serves the vital function of fostering morale and esprit de corps. See Brief for the United States 38-44. This requires both integrity before the fact in the issuance of the medals and integrity after the fact in honoring only those who

actually did receive them. A system of recognition must be seen as based on actual merit to fulfill its purpose. This is not to say that specific acts of heroism are motivated by the desire to receive a medal. Cf. 617 F. 3d, at 1217. They generally are not. It is to say that morale and esprit de corps are enhanced when service members perceive that recognition is given where it is due and only where it is due. The importance of these psychological factors may not be readily apparent to those without military experience, but they have been uniformly recognized by military experts for centuries. "Military leaders and scholars of military psychology have long recognized the importance of morale as a critical determinant of performance during different types of military operations [citations]." Britt & Dickinson, Morale During Military Operations: A Positive Psychology Approach, in Military Life: The Psychology of Serving in Peace and Combat 157 (T. Britt, A. Adler, & C. Castro eds. 2006). Recognition for performance is one of the factors that goes into morale. See *id.*, at 160, 171.

The false claims at issue here cause real harm. The harm may not always be tangible, but it is real and important nonetheless.

B. Viewpoint Neutrality.

Even otherwise unprotected speech cannot be regulated in a way that discriminates against one viewpoint in favor of another. See *R. A. V.* v. *City of St. Paul*, 505 U. S. 377, 388 (1992). The statute at issue in the present case does not suffer that defect.

In *Schacht* v. *United States*, 398 U. S. 58 (1970), this Court dealt with the viewpoint neutrality issue regarding a closely related statute. In 18 U. S. C. § 702, Congress prohibited the wearing of military uniforms without authority. Another statute, 10 U. S. C. § 772(f),

provided, " 'While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit that armed force*.' " *Schacht*, *supra*, at 59-60 (emphasis added by the Court).

Schacht was prosecuted for wearing a uniform in an anti-war street skit. The Court held that the general prohibition statute was clearly valid on its face under the test for expressive conduct, see *id.*, at 61, but § 772(f) was invalid for authorizing expression favorable to the military but criminalizing expression critical of it. See *id.*, at 62-63. In the more recent terminology of *R. A. V.*, § 702 was viewpoint neutral but § 772(f) was viewpoint discriminatory.

Under *Schacht*, the statute in the present case is viewpoint neutral. It makes no difference why a person represents himself as having received a medal. People do sometimes represent themselves as medal recipients to criticize the government. See Oliphant, I Watched Kerry Throw His War Decorations, The Boston Globe, Apr. 27, 2004[2] (describing a well-known, highly controversial protest by Vietnam Veterans Against the War at the Capitol in 1971). Regardless of what viewpoint, if any, a person intends to express by representing that he was awarded a medal, the representation is legal if it is true and criminal if it is a lie.

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2. Available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/04/27/i_watched_kerry_throw_his_war_decorations/ (as visited Dec. 2, 2011).

III. There is generally no constitutional right to lie, with constitutional protection being the exception rather than the rule.

Is there a constitutional right to lie? On its face, the question seems absurd. Government prohibits and punishes lies in such a wide variety of contexts, from the momentous to the minor, that it would seem clear that the decision of which lies to prohibit rests with the legislators and administrators who make the rules, not with the courts. If a schoolchild spends ten minutes in "time out" for saying, "the dog ate my homework," can he sue the teacher under the civil rights law, 42 U. S. C. § 1983? Cf. *Morse* v. *Frederick*, 551 U. S. 393, 399 (2007) (civil rights lawsuit for school discipline, asserting First Amendment claim). That would be the implication of a constitutional right to tell lies as long as they do no tangible, provable harm in the individual case.

A. United States v. Stevens.

The cornerstone of the Court of Appeals' opinion, see *Alvarez*, 617 F. 3d, at 1202-1204, is an expansive interpretation of a passage from *United States* v. *Stevens*, 559 U. S. __, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010), the "crush video" case. In that passage, the Court was responding to an argument that a category of speech could be excluded from protection and subject to unlimited content-based regulation based on "a simple balancing test . . . 'of the value of the speech against its societal costs.' " *Id.*, 130 S. Ct., at 1585, 176 L. Ed. 2d, at 444-445 (quoting Brief for the United States). The Court noted that past exclusions from protection have involved traditionally recognized categories. See *id.*, 130 S. Ct., at 1584, 176 L. Ed. 2d, at 443-444. However, the Court did not go so far as to hold that these categories were exclusive, much less

that they are limited to particular varieties of speech that were actually banned in a prior era.

> "Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them." *Id.*, 130 S. Ct., at 1586, 176 L. Ed. 2d, at 446.

If *Stevens* really mandated a purely historical analysis for determining what is included in "the freedom of speech" protected by the First Amendment, an enormous amount of settled law would be overturned. The *Stevens* opinion, 130 S. Ct., at 1584, 176 L. Ed. 2d, at 444, includes a quote from *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Considering the sentence from *Chaplinsky* quoted in *Stevens* with the one that immediately follows illustrates the problem. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have *never been thought to raise any Constitutional problem*. These include the lewd and obscene, *the profane*, the libelous, and the insulting or 'fighting' words—those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace." *Chaplinksy*, *supra*, at 571-572 (emphasis added; footnote omitted.) But of course banning the profane *has* been thought to raise a constitutional problem since 1971, see *Cohen* v. *California*, 403 U. S. 15, and it continues to raise issues today, as in *FCC* v.

Fox Television Stations, Inc., No. 10-1293, presently before the Court.

Is historical practice then a constitutional ratchet? Does "the freedom of speech" include everything that was not banned in 1791 plus some things that were? Is the legislative branch barred from addressing any speech-related issue that was not considered serious enough to warrant legislative action in the founding era, including those that simply did not exist then, and also barred from regulating any speech that the judicial branch decides should now be added on to the historically recognized scope? Such a result would be cheered by those who favor the absolutist view that the government should not regulate any speech whatever,[3] but it can hardly be squared with a respect for the separation of powers and the people's right to govern themselves through the democratic process.

This Court's precedents refute the notion that regulation of falsehoods is limited to the categories recognized at an early point in our history. The tort of "false light" is a modern invention, reaching falsehoods not covered by the traditional law of defamation. See *Time, Inc.* v. *Hill*, 385 U. S. 374, 380-387 (1967) (describing law much broader than common law). Yet the Court upheld a jury verdict for "knowing falsehoods" placing the plaintiff in a false and embarrassing but not defamatory light in *Cantrell* v. *Forest City Pub. Co.*, 419 U. S. 245, 248, 254 (1974). In this context of a modern tort not fitting into the classical mold of defamation, the Court in *Time, Inc.*, *supra*, at 389, noted, "But the

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3. "The absolutist view of free speech has been championed and most closely associated with Justices Black and Douglas, but it has never been explicitly adopted by a majority of the Court." 5 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 20.7(b)(i), p. 33 (4th ed. 2008) (footnote omitted).

constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." (Emphasis in original).

Nor could a strict historical practice theory be reconciled with the extensive regulation of commercial speech. To cite just one example, 15 U. S. C. § 78n(d)(1) prohibits certain offers to buy stock, even if completely truthful, unless the offeror has complied with certain filing requirements. This prohibition does not remotely fit within the common law definition of fraud, even though its underlying purpose may be to prevent fraud. The prohibition is vastly broader. Could this sweeping prohibition pass the "strict scrutiny" test? Surely not. Securities laws survive because they are judged with a more lenient test. See *Bulldog Investors Gen. Pshp.* v. *Secretary*, 460 Mass. 647, 658-659, 953 N. E. 2d 691, 701-702 (2011) (citing *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 561-562 (1980)). This more lenient test for commercial speech is not based in history. See *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 522 (1996) (Thomas, J., concurring in part).

The thesis that strict scrutiny applies to every content-based regulation that does not fit within the four corners of a historically recognized limitation on speech is insupportable. One might infer such a rule from reading *Stevens* in isolation, but not if one reads *Stevens* in the context of the rest of First Amendment law.

B. Lies, History, and "the Freedom of Speech."

"Congress shall make no law . . . abridging the freedom of speech . . . ." U. S. Const., Amdt. 1. History, precedent, and common sense indicate that lying is simply not within "the freedom of speech." See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974). There

are, to be sure, some limitations in this Court's precedents on the ability of government to punish lies. However, these limitations are invariably for the purpose of protecting the expression of opinions and of facts honestly believed (whether or not actually true).

In some applications of the Bill of Rights in recent years, the Court has looked to practices in the founding era to determine what would have been allowed then as an indication of what the constitutional text means. See, *e.g.*, *Crawford* v. *Washington*, 541 U. S. 36, 53-54 (2004). This approach is more problematic with First Amendment. Defining freedom of speech was a work in progress. The 1735 trial of John Peter Zenger in New York is celebrated for advancing the proposition that truth is a defense to libel. See 5 Rotunda & Nowak, *supra*, § 20.4(a), at 18-19. Yet as late as 1805, there was sufficient doubt on this subject that the New York legislature needed to enact a statute on it. Even under the statute, truth was not a defense by itself but admissible to establish "the matter charged as libelous, was published with good motives and for justifiable ends." See *People* v. *Croswell*, 3 Johns. Cas. 337, 411-412 (N. Y. 1804) (annotation to the opinion noting subsequent statute).[4] Massachusetts also followed a rule of truth as relevant to motivation rather than a defense in itself, effectively making truth a defense for criticism of public officials but not in private matters. See *Commonwealth* v. *Clap*, 4 Mass. 163, 168-170 (1808).

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4. *Croswell* was an ironic twist on the Sedition Act controversy. The defendant was prosecuted for libel against President Jefferson for alleging Jefferson's involvement in the libel of Presidents Washington and Adams. See also D. McCullough, John Adams 488 (2001).

The development of freedom of speech during the colonial era was in substantial part based on an increasing recognition of the importance of truth.

> "And 'development' is the operative word, for the Zenger case did not occur in isolation. It was part of an ongoing process. It helped crystallize public opinion and virtually ended common law prosecutions for seditious speech in the colonies, thus helping to set the stage for later changes in the law regarding truth as a defense. But in so doing, it drew upon a growing, practical colonial tradition. *A tradition that truth really did matter* when a colonist impugned authority." Eldridge, Before Zenger: Truth and Seditious Speech in Colonial America, 1607-1700, 39 Am. J. Legal Hist. 337, 357-358 (1995).

The increasing importance of truth was partly the result of the increase in the use of "false news" laws, where falsity of the speech was an element of the offense. See *id.*, at 355. These laws were not limited to defamation. They also included spreading false news about events. See *ibid.*

> "Spreading false news appeared clearly as a crime in colonial law. A 1645 Massachusetts statute ordered punishment for 'every person of the age of discretion, which is accounted fourteen years, who shall wittingly and willingly make or publish any lie which may be pernicious to the common weal.'" *Id.*, at 352.

Virginia's similar statute prohibited spreading false news "tending to the trouble of the country." See *ibid.*

Statutes prohibiting falsehoods deemed injurious to the public good continued during the Revolutionary era. Soon after the Declaration of Independence, legislatures of the new States enacted new laws on treason and

sedition, including new versions of the "false news" statutes. For example, New Jersey enacted a law to punish those who "maliciously and advisedly spread such false Rumours concerning the American Forces, or the Forces of the Enemy as will tend to alienate the Affections of the People from the Government . . . ." Act of Oct. 4, 1776, ch. V, § 3 in Acts of the General Assembly of the State of New-Jersey 5 (1784) (reprinted in The First Laws of the State of New Jersey (J. Cushing comp. 1981)). New Hampshire similarly punished those who "shall wittingly and willingly make or spread any false news, or reports with the intent to deceive . . . and to injure the common cause . . . ." Act of Jan. 17, 1777, in Acts and Laws of the State of New-Hampshire in America 63 (1780) (reprinted in The First Laws of the State of New-Hampshire (J. Cushing comp. 1981)).

Amici do not contend that these statutes would be constitutional today. Phrases such as "tending to the trouble of the country" are excessively vague. See *Smith* v. *Goguen*, 415 U. S. 566, 573 (1974) ("greater degree of specificity" required in regulations of expression). Some of the laws are viewpoint discriminatory on their face, and the others would be in application.[5] What these broad founding-era statutes demonstrate is that the government's authority to prohibit falsehoods was not thought to be confined to the narrow channels of defamation of persons or fraud, as the Court of Appeals majority believed in the present case. See *Alvarez*, 617 F. 3d, at 1207-1209. To the extent that any original understanding can be discerned, it appears to be consistent with the clear statement in *Gertz* v.

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5. The last surviving "false news" statute in an English common law country was struck down by the Supreme Court of Canada in the case of a Holocaust denier. See *Queen* v. *Zundel*, [1992] 2 S. C. R. 731, 732. The result would probably be the same under our First Amendment, but not necessarily the reasoning.

Robert Welch, Inc., 418 U. S. 323, 340 (1974), that intentional lies on matters of fact are simply outside the constitutionally protected freedom of speech. Constitutional limitations on the government's authority to punish lies exist not to protect lies but to protect "speech that matters" from self-censorship when people fear that they might be falsely accused of lying. See *id.*, at 340-341; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279 (1964).

C. "Breathing Space" Limitations.

The two landmark defamation cases, *New York Times Co.* and *Gertz*, established a variety of rules based on the variables of opinion, truth, and public concern. Opinion has no official "truth" and cannot be excluded from protection based on falsity. *Gertz*, 418 U. S., at 339-340. Between the poles of pure opinion and pure fact, there are opinions about facts and statements of opinion with factual implications. A factual allegation is not immunized by phrasing it as an opinion. See *Milkovich* v. *Lorain Journal Co.*, 497 U. S. 1, 19 (1990). An opinion about a fact may be honestly held even if contrary to overwhelming evidence. Strange as it seems, some people genuinely believe that the moon landing was faked or that the Holocaust is a myth. As the present case involves an objective fact within the defendant's personal knowledge, there is no need to explore this aspect of the First Amendment here.

For facts, truth is protected but lies are not, at least not for their own sake. See *Gertz*, 418 U. S., at 340. In the middle ground between truth and lies, *New York Times Co.* established constitutional protection for "erroneous statements *honestly* made." 376 U. S., at 278 (emphasis added).

Yet even for citizens' criticisms of public officials in the performance of their duties, the type of speech warranting the very highest measure of First Amendment protection, *New York Times Co.* did not extend immunity to bald-faced lies. Speakers can still be held liable[6] for a false statement made "with knowledge that it was false or reckless disregard of whether it was false or not." *Id.*, at 280.[7] To ensure that the statements are on the intentional/reckless side of the line rather than the honest mistake side before liability is imposed, the burden is placed on the plaintiff to show the requisite mental state with "convincing clarity." See *id.*, at 285-286. This tilt toward the defendant in borderline cases means that some lies will be incidentally protected in the interest of ensuring that honest mistakes are protected. Cf. *In re Winship*, 397 U. S. 358, 372 (1970) (Harlan, J., concurring) (burden of proof in criminal cases based on difference in "social disutility" of two potential errors). This is a "breathing space" limitation. See *Gertz*, 418 U. S., at 342.

As we move away from criticism of public officials, the demands of the First Amendment become less demanding. A private defamation plaintiff is not required to meet the *New York Times* "actual malice" standard, but he is limited to actual damages if he does not, at least if the speech involves matters of public

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6. Or criminally prosecuted. There is no difference in the scope of First Amendment protection. See *id.*, at 277.

7. The *New York Times Co.* Court labeled this *mens rea* requirement "actual malice." *Ibid.* That was a confusing and unfortunate choice, having nothing to do with what "malice" means in common usage. See *Herbert* v. *Lando*, 441 U. S. 153, 199 (1979) (Stewart, J., dissenting). The term should be replaced with the more appropriate "scienter." See 5 Rotunda & Nowak, *supra*, § 20.33(a)(iii), at 306-307.

concern. See *id.*, at 418 U. S., at 347, 350. Even the *Gertz* limitation may not apply when the matter is purely private. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 761 (1985) (plurality opinion) (false statement in credit report).

The great danger that the First Amendment primarily protects against is government restriction of speech that suppresses dissent on matters of public concern. Absent a "'threat to the free and robust debate of public issues,'" the First Amendment's "protections are less stringent." *Id.*, at 760 (quoting *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Ore. 361, 366, 568 P. 2d 1359, 1363 (1977)). Viewpoint discrimination is the core problem, forbidden even when the speech lies within an otherwise unprotected category. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 388 (1992).

The Court of Appeals majority in the present case thought that defamatory lies were a special category singled out for less First Amendment protection than other lies. See *Alvarez*, 617 F. 3d, at 1207-1208. The long and ignoble history of defamation laws as an instrument for suppressing political dissent cautions against such a conclusion. The *scandalum magnatum* action was used in England against "slandering or scandalizing the great men of the realm" and in the colonies against "deriding or criticizing high-level colonial officials . . . ." Eldridge, 39 Am. J. Legal Hist., at 338. John Peter Zenger was tried for seditious libel for publishing articles critical of the royal governor. See 5 Rotunda & Nowak, *supra*, § 20.4(a), at 18-19. The notorious Sedition Act was "levelled against the right of freely examining public characters and measures, and of free communication among the people thereon . . . ." Virginia Resolutions of Dec. 21, 1798, reprinted in 5 The Founders' Constitution 135, 136 (P. Kurland & R. Lerner eds. 1987). When alleged defamation involves

public officials, matters of public interest, or both, this history calls for special scrutiny, not special laxity. Prohibition of other kinds of lies does not carry this historical baggage, and the decision as to which lies to prohibit has been largely and correctly seen to be a matter of policy, not constitutional law.

D. Punishment of Simple Lies.

The Court of Appeals majority in this case said, "We are aware of no authority holding that the government may, through a criminal law, prohibit speech *simply* because it is knowingly factually false." 617 F. 3d, at 1213. Actually, governments do that often, in statutes not thought to present any constitutional difficulty. See Brief for Professors Eugene Volokh and James Weinstein as *Amici Curiae*, Part I.

In *United States* v. *Wells*, 519 U. S. 482, 484 (1997), this Court considered whether materiality is an element in the statute prohibiting a false statement to a bank. The Court decided it was not. See *ibid.* Justice Stevens dissented strongly, but as a matter of statutory interpretation, not constitutional law. He gave the colorful hypothetical of an applicant who lies on a subject not material to his creditworthiness but simply to butter up the loan officer. See *id.*, at 512.[8] He could not imagine that Congress *intended* to prohibit such lies. He did not question that Congress had the *power* to prohibit such lies. The majority opinion noted, " 'There can be no question that Congress was entitled to require that the

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8. Justice Stevens' hypothetical applicant flatters the loan officer, a known bow-tie aficionado, by falsely claiming he always wears one himself. See *id.*, at 512, n. 14. One can only wonder if there is a true story behind the hypothetical. Cf. *Alvarez*, 638 F. 3d, at 675 (Kozinski, J., concurring in denial of rehearing en banc) ("to get a clerkship").

information be given in good faith and not falsely with intent to mislead.'" *Id.*, at 494 (quoting *Kay* v. *United States*, 303 U. S. 1, 5-6 (1938)). The doctrine of constitutional doubt would have bolstered Justice Stevens' statutory interpretation argument, cf. *Zadvydas* v. *Davis*, 533 U. S. 678, 689 (2001), but he did not invoke it. Why not? Probably because there is no doubt.

One might try to brush off this case as a commercial speech case, assigning commercial speech to a marginally protected subbasement of the First Amendment. But that is not easily done. It is not clear that this is commercial speech. It is certainly not within the core meaning of the term. The loan application proposes a transaction, see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 562 (1980), but the flattery of the loan officer does not. While the Court has stated that the government can prohibit false or misleading commercial speech, see *id.*, at 566, it has not stated that this extends to any speech having a tenuous connection with a commercial transaction. See *Nike, Inc.* v. *Kasky*, 539 U. S. 654, 676 (2003) (Breyer, J., dissenting from denial of certiorari) ("mixture of commercial and noncommercial"). If the government can prohibit such tangential lies, it is more likely because government can prohibit lies generally.

The statutes most closely analogous to the one in this case are the false impersonation statutes. Such laws are in force in most jurisdictions. Curiously, the Court of Appeals majority opinion states broadly that such statutes require an additional element of obtaining a benefit at a cost to another, but it only cites one such statute to support that proposition, the federal one. See 617 F. 3d, at 1212. While many such statutes do have an additional element, many others do not. For example, Hawaii Rev. Stat. §710-1016.7(1) provides, "A person commits the offense of impersonating a law

enforcement officer in the second degree if, with intent to deceive, the person pretends to be a law enforcement officer." This is a misdemeanor, see *id.*, subd. (2), as is the offense in the present case. Similar laws include Minn. Stat. § 609.475 (police, military, or public officer, misdemeanor), Idaho Code § 20-219A (probation/parole officer, misdemeanor), and Mass. Gen. Laws, ch. 21A, § 10D (environmental officers, fine of $10-$100). In Wisconsin, impersonating a peace officer with intent to mislead is a crime with or without the additional element of facilitating another crime, but that additional element elevates the offense from a misdemeanor to a felony. See Wis. Stat. § 946.70. The pattern shows that impersonation alone is a minor offense, a lesser degree of offense, or not an offense at all as the legislature of the particular jurisdiction chooses. This is a question of policy, not of constitutional limitation.

IV. A viewpoint-neutral law prohibiting a lie requires no more than a legitimate government interest.

In the present case, concurring in the denial of rehearing en banc in the Court of Appeals, Chief Judge Kozinski wrote a colorful opinion describing the "terrifying" world where the government attempts to prohibit all lies, no matter how trivial or personal. See *United States* v. *Alvarez*, 638 F. 3d 666, 673 (CA9 2011). He lists a variety of "white lies" that government ought not prohibit. See *id.*, at 674-675.

Yet the very next paragraph reveals the flaw in the argument. Minor deception can be achieved by conduct as well as by words, see *id.*, at 675, and the First Amendment protects expressive conduct to a lesser

degree.[9] A statute forbidding people to lie about their height in an online dating profile would be offensive, but a statute forbidding people to wear elevator shoes, one of Judge Kozinski's examples in the second paragraph, would be equally offensive *for the same reason*. The reason these laws would be offensive is not because they restrict speech—the second one does not—but because they involve government intrusion into private matters.

There are constitutional limitations on government intrusion in private matters under the Due Process Clause, see, *e.g.*, *Troxel* v. *Granville*, 530 U. S. 57 (2000) (grandparent visitation), but these cases are among the most controversial the Court has decided, and they have reached only a few areas. For the most part, the defense against excessive intrusion by state governments is democratic rather than judicial. Legislators know that if they actually did outlaw all the minor verbal deceptions in Judge Kozinski's first paragraph or the minor conduct deceptions in the second one, the voters would surely give them the boot in the next election. Judge Kozinski's nightmare scenario assumes a legislature chomping at the bit to outlaw every speck of falsehood it constitutionally can, but no such legislature exists in any state in this country.

This case, of course, involves a federal statute. The people have an additional constitutional protection against federal legislation regulating minor matters. Congressional legislation is limited to the powers enumerated in the Constitution. Regulation of speech

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9. Indeed, after the decision now under review, the Ninth Circuit upheld subdivision (a) of the same statute, prohibiting the false wearing of medals, applying the expressive conduct test. See *United States* v. *Perelman*, 658 F. 3d 1134 (2011) (petition for rehearing held in abeyance pending resolution of the present case).

is not an enumerated power. This was the primary argument against the Sedition Act, with freedom of speech and press being secondary. See Virginia Resolutions of Dec. 21, 1798, reprinted in 5 The Founders' Constitution 135-136 (P. Kurland & R. Lerner eds. 1987); see also *Garrison* v. *Louisiana*, 379 U. S. 64, 83-88 (1964) (appendix to opinion of Douglas, J., excerpt from address by James Madison). Today, Congress is understood to have the power to regulate speech in a variety of contexts under the Necessary and Proper Clause. While that clause grants Congress "broad authority," see *United States* v. *Comstock*, 560 U. S. __, 130 S. Ct. 1949, 1956, 176 L. Ed. 2d 878, 889 (2010), that authority is not unlimited. "[W]e look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.*, 130 S. Ct., at 1956, 176 L. Ed. 2d, at 890. There is, therefore, a constitutional government interest requirement for *every* federal statute, whether it regulates speech or conduct.

For the states, the question of whether there is a constitutional state-interest floor to prevent the punishment of the trivial and personal lies that Judge Kozinski mentions could be left to another case, when a state statute is at issue. Alternatively, the Court could pass on setting a standard on the ground that this statute obviously passes whatever test might be established. The situation is analogous to *Herrera* v. *Collins*, 506 U. S. 390 (1993). In that case, the Court did not need to decide on the standard for free-standing claim of innocence by a condemned inmate because the evidence of Herrera's guilt was so strong and his contrary evidence so weak that he could not meet any conceivable standard. See *id.*, at 417-419. As the Ninth Circuit found in *Perelman* regarding the expressive conduct subdivision of the same statute, this law meets the *compelling* government interest standard, *United*

States v. *Perelman*, 658 F. 3d 1139-1140 (2011), the highest that might be invoked.

However, if the Court believes it is necessary to establish a limiting principle, it can look to *Gertz*. The *Gertz* Court referred repeatedly to a "legitimate state interest." See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341-349 (1974). The requirement that a statute be rationally related to a legitimate state interest is a familiar one from equal protection law, and it is not a toothless one. See, *e.g.*, *Romer* v. *Evans*, 517 U. S. 620, 631-632 (1996). That standard is sufficient to proscribe government intrusion into the trivial and personal falsehoods that Judge Kozinski is concerned about. No further constitutional protection of outright lies is needed. Let the legislative branch decide which lies are important enough for the government to bother punishing.

To sum up, *amici* suggest that a viewpoint-neutral prohibition of an intentional lie (a false statement of fact known by the speaker to be false, made with the intent to deceive) is consistent with the First Amendment if the prohibition is rationally related to a legitimate state interest. For the reasons stated in part II of this brief, Part III-A of the Brief for the United States, and by the Ninth Circuit in *Perelman*, this statute easily passes that test.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

December, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-210

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of respondent in *United States v. Alvarez*, No. 11-210.[1]

NACDL is a nonprofit organization with a direct national membership of more than 10,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus*

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. After receiving timely notice from *amicus curiae*, the parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk of the Court.

curiae briefs in criminal cases in this Court and other courts.

SUMMARY OF ARGUMENT

Congress is in the midst of a criminalization explosion. Between 2000 and 2007, it has, on average, passed a new criminal law for each week of the year. In 2005-2006 alone, the 109th Congress proposed almost two new non-violent criminal offenses for each day it was in session. Whether its appetite for criminalization stems from a desire to appear "tough on crime" or a collective mentality that societal harms can be solved only through criminalization, its haste to exercise what Professor Herbert Wechsler called "the strongest force that we permit official agencies to bring to bear on individuals" is resulting in the Government's infringement on essential American rights and liberties. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

The Stolen Valor Act of 2005 presents a prime example of the problems that can result from Congress's rush to criminalize. On its face, the Stolen Valor Act prohibits an individual's purely verbal or written false claim of having received a military award or decoration—a lie about only one's self. The law, a content-based proscription on speech, does not require that the false statement be made publicly or that it be believed by any listener. It does not require that the misrepresentation harm anyone or that it be

made for the purpose of receiving anything of value. The speaker's intent in making the false claim is irrelevant, and there are no exceptions for theatrical performances or satire. Even innocent mistakes can result in imprisonment. In these respects, the Act is unique in the United States Code. The public's primary safeguard against prosecution of innocent mistakes, harmless misrepresentations, and theatrical performances is the Government's promise that it will carefully exercise its discretion in deciding when and against whom to bring charges. That is of little solace and no constitutional significance. Despite the staggering breadth of the law, there was no serious debate about its constitutionality as it made its way through Congress.

The Stolen Valor Act's "false claims" provision, codified at 18 U.S.C. § 704(b), offends the Constitution and infringes on this country's fundamental provision of freedom of expression. It should be struck down based on well-established constitutional principles and doctrine. *First*, even if this Court believes that the Stolen Valor Act has some legitimate and constitutional applications, and even if it were inclined to find that the statute's application to Respondent Xavier Alvarez (or even all of the individuals who have thus far been prosecuted under the Stolen Valor Act) was constitutional, the Act is nonetheless unconstitutionally overbroad on its face. Congress's failure to include a *mens rea* requirement, a public speech requirement, a harm requirement, or even an exception for artistic performances, satire, or innocent mistakes

renders the Act unprecedented in its breadth and likely to chill protected speech. *Second*, irrespective of the level of scrutiny this Court applies, the asserted justifications for the Act are insufficient to support a content-based prohibition on speech.

NACDL recognizes that overcriminalization in itself is not a basis for overturning this law and is cognizant that it is not for this Court or any court to question Congress's wisdom with respect to the laws it enacts or how it enacts them. Rather, it is the responsibility of the judicial branch to measure those laws against the Constitution. NACDL has long been concerned, however, that "expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from this anchor." Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Found. & NACDL, April 2010, at Foreward, vi. Against this backdrop and based on the Constitution, NACDL urges this Court to affirm the decision of the court of appeal and strike the Stolen Valor Act of 2005 as unconstitutional.

ARGUMENT

I. THE STOLEN VALOR ACT AND THE OVERCRIMINALIZATION PHENOMENON

A. The 109th Congress

The 109th Congress was in session from January 4, 2005 through December 8, 2006. It became sometimes

known as the "Do-Nothing Congress." *See* Thomas Mann & Norman Ornstein, *Our Do-Nothing Congress*, Los Angeles Times, Sept. 27, 2006, at Opinion, *available at* http://articles.latimes.com/2006/sep/27/opinion/oe-mann27 (last visited Jan. 17, 2012); Daniel Schorr, *This Do-Nothing Congress Did All the Wrong Things*, Christian Science Monitor, Dec. 15, 2006, at Commentary, *available at* http://www.csmonitor.com/2006/1215/p09s02-cods.html (last visited Jan. 17, 2012). It was in session less than virtually any Congress since World War II. *See* Editorial, *109th Congress' Big Success: Lowering the Achievement Bar*, USA Today, Dec. 10, 2006, *available at* http://www.usatoday.com/news/opinion/editorials/2006-12-10-our-view_x.htm (last visited Jan. 17, 2012); John Cochran, *'Do-Nothing Congress' Raises Critics' Ire*, ABC News, May 12, 2006, *available at* http://abcnews.go.com/Politics/Story?id=1955256&page=1 (last visited Jan 16, 2012); Mann & Ornstein, *supra*.

At least with respect to criminalization, the "Do-Nothing Congress" label was inapt. Despite being in session infrequently, the 109th Congress proposed 203 bills containing 446 new non-violent[2] related criminal offenses. Walsh & Joslyn, at 2, 11. It ultimately

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[2] This brief uses the phrase "non-violent offenses" as shorthand for offenses that do not involve either violence, drugs and drug trafficking, pornography, and immigration violations. This brief's use of the term "non-violent offenses" is merely a shorthand description and is not intended to suggest that the excluded offenses are necessarily violent in nature.

enacted 13 of the 203 proposed bills, containing 36 non-violent criminal offenses. *Id.* at 13. But as those critics noted, "[t]he big problem with this Congress is not what it didn't do, it is what it did, and did badly." Mann & Ornstein, *supra*.

B. The Stolen Valor Act of 2005

The 109th Congress passed the Stolen Valor Act of 2005 (the "Act") on December 6, 2006 by unanimous consent in the Senate and voice-vote in the House. On December 20, 2006, President George W. Bush signed it into law. Pub. L. No. 109-437, § 3, 120 Stat. 3266. The Act's stated purpose was "to enhance protections relating to the reputation and meaning of the Medal of Honor and other military decorations and awards." *Id.* The Act amended a law that previously imposed criminal penalties, including imprisonment, on anyone who "knowingly wears, manufactures, or sells any decoration or medal authorized by Congress for the armed forces of the United States...." 18 U.S.C. § 704(a) (2005). The pre-2006 version of Section 704 was in many ways akin to laws proscribing the possession, sale, or manufacture of government badges and identification cards, 18 U.S.C. § 701, or badges or medals of Congressionally incorporated veterans groups, 18 U.S.C. § 705; the wearing or displaying of the sign of the Red Cross, 18 U.S.C. § 706, or the emblem of the 4-H Club, 18 U.S.C. § 707; or the reproduction or use of the character or name of Smokey Bear, 18 U.S.C. § 711, or Woodsy Owl, 18 U.S.C. § 711a. Each permits the Government to charge an

offender with a misdemeanor for his role in an *act* of deception involving a protected emblem, insignia, or character. While the Act also broadened the categories of prohibited conduct regarding military awards and decorations to include purchasing, soliciting for purchase, mailing, shipping, trading, and advertising for sale any military awards or medals, it was another new and novel provision of the Act that went much further and is the subject of this case.

In sub-part (b) of the Act, Congress outlawed a purely verbal or written false claim to having been awarded any military medal or decoration:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b). That is, Congress made it illegal to lie or even be mistaken about having received any military award irrespective of whether the statement was made publicly or privately, was made to gain something of value or harm anyone, or even whether the speaker intended his claim to be accepted as true. There is no similar law in the United States Code.

Congress made three findings to support the Act's new and novel basis for criminal prosecution:

> (1) Fraudulent claims surrounding the receipt of the Medal of Honor, the distinguished-service cross, the Navy cross, the Air Force cross, the Purple Heart, and other decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.
>
> (2) Federal law enforcement officers have limited ability to prosecute fraudulent claims of receipt of military decorations and medals.
>
> (3) Legislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.

Pub. L. No. 109-437, § 2, 120 Stat. 3266 (2006). Congress made no findings that lying about military medals was actually a significant problem. *Id.*

C. The Stolen Valor Act and the Phenomenon of Overcriminalization

1. The Legion of Federal Criminal Laws

This Court has recognized that "[a]ll are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). It is almost cliché for lawyers and judges to say that ignorance of the law is no defense. "Historically, it was presumed that the law, and especially the criminal

law, was 'definite and knowable,' even by the average person." Walsh & Joslyn, at 4. While that may have been true when criminal laws were primarily directed to prohibiting *malum in se*—"evil in itself"—conduct, it is no longer so.

> Whatever its plausibility centuries ago, the "definite and knowable" claim cannot withstand modern analysis. There has been a "profusion of legislation making otherwise lawful conduct criminal (*malum prohibitum*)." Therefore, even a person with a clear moral compass is frequently unable to determine accurately whether particular conduct is prohibited.... In today's complex society, therefore, a person can reasonably be mistaken about the law.

Joshua Dressler, *Understanding Criminal Law* 166 (3d ed. 2001) (internal quotation marks and citations omitted).

Today, there is no list of all of the federal criminal statutes and regulations currently on the books. Walsh & Joslyn, at 6. Indeed, it may be impossible to compile such a list. *Id.* at 2-4. In the late 1980s, the Department of Justice suggested there were more than 3,000 federal criminal laws. *See* James A. Strazzella, *The Federalization of Criminal Law*, Criminal Justice Section, American Bar Association, 1998, at 94. In 1998, an American Bar Association Task Force on the Federalization of Crime concluded that it was virtually impossible to get an accurate count of all of the federal crimes because the statutes are complex, there

are so many, their location in the United States Code and Code of Federal Regulations is so scattered, and there are nearly 10,000 regulations that are nearly impossible to categorize because they mention some sort of criminal or criminal-type sanction. *Id.* at 10. That same ABA Task Force study found that, "of the federal criminal provisions passed into law during the 132-year period from the end of the Civil War to 1996, fully 40 percent were enacted in the years from 1970 to 1996." *Id.* at 7-8.

Ten years after the ABA Task Force report, Professor John S. Baker, Jr., while acknowledging many of the same difficulties as the ABA Task Force in trying to accurately count the total number of federal criminal laws, concluded that by the end of 2007 the United States Code contained at least 4,450 federal criminal laws. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memo. No. 26, June 16, 2008, at 5. Of those 4,450 federal criminal laws, approximately 452—a full ten percent—had been added in the eight years from 2000 through 2007, an average rate of 56.5 new criminal laws per year—*i.e.*, more than one per week. *Id.* at 1-2. Professor Baker commented that this rate is

> roughly the same rate at which Congress created new crimes in the 1980s and 1990s. So for the past twenty-five years, a period over which the growth of federal criminal law has come under increasing scrutiny, Congress

> has been creating over 500 new crimes per decade.

Id. Perhaps out of a desire to appear "tough on crime" or Congress's apparently inevitable response or knee-jerk tendency to any newsworthy problem, Professor Baker found that the rate at which Congress creates criminal laws increases during election years. *Id.* at 2; Brian W. Walsh and Benjamin P. Keane, *Over-criminalization and the Constitution*, Heritage Foundation Legal Memo. No. 64, April 13, 2011, at 3-5.

2. The Problems of Overcriminalization

Frequently swept aside by the current flood of federal criminalization is the notion that conceptualizing and drafting criminal prohibitions and punishment demands deliberation and debate. Walsh & Joslyn, at 2. In the 109th Congress, for example, legislators proposed 446 new non-violent offenses contained in 203 bills—a staggering number, which does not even account for all of the offenses relating to drugs, firearms, pornography, or immigration—making it unreasonable to expect that each could receive the necessary attention and consideration. *Id.* Consequently, many of these laws are poorly drafted, inadequately conceived, and constitutionally flawed. *Id.* This is particularly problematic in the area of criminal law with its power to prohibit, command, and punish. Academics and criminal defense lawyers have identified numerous concerns about Congress's rush to criminalize. Brian W. Walsh and Benjamin

P. Keane, *Overcriminalization and the Constitution*, Heritage Foundation Legal Memo. No. 64, April 13, 2011, at 2-6; Walsh & Joslyn, at 3-5. These concerns include the following:

> *Overbroad*: Often, Congress's rush to "cure" societal wrongs—even legitimately—can come with unintended consequences in the form of criminalizing innocent, protected, and even beneficial conduct and speech. *United States v. Stevens*, 130 S. Ct. 1577 (2010). Only through careful legislative consideration and deliberation can the process of narrow tailoring occur. Indeed, federal criminal statues often prohibit such a broad swath of conduct that few lawyers, let alone non-lawyers, could determine what conduct they prohibit and punish. Walsh & Joslyn, at 4.
>
> *Vagueness/Lack of Fair Notice*: The concept of fair notice is rooted in the Constitution's due-process protections. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting *Lanzetta*, 306 U.S. at 453). In other words, "a criminal law must give fair warning of the conduct it makes a crime." *Id.* at 350-51. Yet, in its now decades-long rush to criminalize conduct, Congress is enacting criminal punishments relying on undefined and unlimited phrases like the "intangible right of honest services." 18 U.S.C. § 1346. That law was significantly circumscribed

decades after it was enacted and after thousands of Americans were indicted and imprisoned. *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010).

No Mens Rea: The *mens rea* requirement has been a part of Anglo-American law since long before the founding of this country, and "requiring the government to prove that a defendant had a guilty mind at the time she committed a guilty act 'is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" Walsh & Joslyn, at 3 (citation omitted). This Court has described this principle as being "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). Despite the recognized importance of a *mens rea* requirement, a joint Heritage Foundation and NACDL study concluded that of the thirty-six non-violent offenses introduced during the 109th Congress, a full one-quarter had no *mens rea* requirements whatsoever and almost forty percent had only "weak" *mens rea* requirements.[3] Walsh & Joslyn, at 11-15.

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[3] The Heritage/NACDL report put offenses in the "weak" category if the statute's "language is reasonably likely to protect from conviction at least some defendants who did not intend to violate a law and did not have knowledge that their conduct was

(Continued on following page)

> *Too Much Prosecutorial Discretion*: Federal overcriminalization results in essentially handing federal prosecutors broad, if not unfettered, control over criminal adjudications and legislative interpretations. Walsh & Keane, at 5-6. The Government's brief in this case notes that it will pursue "carefully chosen prosecutions—where the government can prove that the defendant's claim was false and that he was aware of its falsity—to deter all knowingly false claims to have received military honors." Gov't Br., at 55. But beyond choosing *whom* to prosecute, overcriminalization provides the Government with additional tools regarding *how* to prosecute. "The proliferation of vague and overly broad laws has given federal prosecutors the ability to stack criminal charges against defendants," thereby allowing prosecutors to "jack up the threat value of trial and thereby induce a guilty plea, even if the government's case is weak." Walsh & Keane, at 5 (citation omitted).

All of these concerns are manifest in the Stolen Valor Act.

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unlawful or sufficiently wrongful to put them on notice of possible criminal responsibility." Walsh & Joslyn, at 15.

3. The Stolen Valor Act as an Example of Overcriminalization

The Stolen Valor Act moved quickly from conception to enactment.[4] It was first proposed in the House of Representatives on July 19, 2005. H.R. 3352: Stolen Valor Act of 2005, http://www.govtrack.us/congress/bill.xpd?bill=h109-3352. It was introduced in the Senate on November 10, 2005. S. 1998: Stolen Valor Act of 2005, http://www.govtrack.us/congress/bill.xpd?bill=s109-1998. The Senate passed its version on September 7, 2006 by unanimous consent—there is no record of who voted for it. *Id.* The House ultimately passed the Senate version by voice-vote on December 6, 2006—again, there is no record of who voted for it. *Id.* Despite the fact that the law contained a content-based proscription on speech, there does not appear

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[4] The Stolen Valor Act of 2011 is currently pending legislation before both the House (H.R. 1775) and Senate (S. 1728). The bills are currently before the House and Senate Judiciary Committees, respectively. This proposed legislation would strike and replace the current Section 704(b).

Significantly, the Stolen Valor Act of 2011 expands criminal punishment for purely written or verbal misrepresentations regarding any military service in general and is not limited to the receipt of an award or decoration. The proposed law contains at least two important limitations, however. First, the proposal requires the Government to prove that the misrepresentation was knowingly made "with the intent to obtain anything of value." H.R. 1775; S. 1728. The law does not define "anything of value." Second, the law provides that it is a defense to prosecution if the "thing of value" is *de minimis*. H.R. 1775; S. 1728. Setting aside various deficits in the proposed Stolen Valor Act of 2011, the law would ameliorate some of the concerns discussed in this brief.

to have been a serious discussion of the Act's First Amendment implications.

The Stolen Valor Act bears many of the hallmarks of overcriminalization. As discussed in detail below, it is overbroad, vague, lacks a *mens rea* requirement, and provides extensive discretion to federal prosecutors to selectively enforce the law. And for those reasons, this Court should affirm the Court of Appeals.

II. THE STOLEN VALOR ACT IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT REGULATES SUBSTANTIALLY MORE SPEECH THAN THE CONSTITUTION PERMITS

> "The First Amendment requires that we protect some falsehood in order to protect speech that matters."
>
> —*Gertz v. Robert Welch Inc.*, 418 U.S. 323, 341 (1974)

A. Analytical Framework

The Stolen Valor Act is unconstitutionally overbroad because it criminalizes substantially more speech than may be constitutionally regulated. Even if there are some potentially constitutionally permissible applications of the law, and even if one of those may be its application to Respondent (or to each and every one of the individuals who have thus far been prosecuted under the Act), the numerous instances in which the law criminalizes protected speech compels

the conclusion that the Act is unconstitutional on its face.

In a typical facial attack, a challenger must establish that "'no set of circumstances exists under which [the statute] would be valid' or that the statute lacks any 'plainly legitimate sweep.'" *Stevens*, 130 S. Ct. at 1587 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997)). By contrast, according to the Court's overbreadth doctrine, a statute is facially unconstitutional if it prohibits a substantial amount of protected speech as "judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (citation omitted); *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003).

Under the overbreadth doctrine, even an individual whose own speech may constitutionally be prohibited under a given provision is nonetheless permitted to challenge its facial validity because of the threat that the speech of individuals and groups not before the court will be chilled. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). In other words, the facial invalidation that overbreadth permits is necessary to protect the First Amendment rights of speakers who may fear challenging the proscription on their own. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) ("This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear

of criminal sanctions provided by a statute susceptible of application to protected expression.").

In order to support a facial overbreadth challenge there must be a "realistic danger" that the provision will significantly compromise speech rights. *Board of Airport Comm'rs*, 482 U.S. at 574. A law will not be facially invalidated simply because it has some conceivably unconstitutional applications. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). To support a finding that a prohibition on speech is overbroad, there must be a substantial number of instances in which the provision will violate the First Amendment. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). Invalidation for overbreadth is "strong medicine" that is not to be "casually employed." *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999).

B. Four Categories of Protected Speech that Are Subject to Prosecution under the Act

There are at least four categories of protected speech that fall within the Act's reach, and make the Act unconstitutionally overbroad.[5] These four

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[5] In *United States v. Wilson*, 553 U.S. 285, 293, 297 (2008), the Court articulated the two steps of the overbreadth analysis: (1) construe the statute and then (2) determine whether the statute as construed "criminalizes a substantial amount of protected expressive activity." Here, separating the two steps of analysis

(Continued on following page)

categories of conduct will likely comprise a substantial percentage of the actual violations of the Act, even if they do not constitute a substantial or even cognizable percentage of prosecutions under it.

1. Innocent Mistakes

Although the Government suggests that the statute may be construed in such a way that would incorporate a scienter requirement, Gov't Br., at 16, the text of the law contains no *mens rea* or scienter requirement. Individuals who mistakenly state that they are recipients of Congressional medals are thus covered by the language of the law. The absence of a scienter requirement is especially noticeable in that the statute contains no exceptions for those who are mistaken about whether they were awarded a medal at all or, if so, what particular medal they were awarded. For example, an individual who claimed to have been awarded a Bronze Star when, in fact, he received a Silver Star falls within the textual ambit of the Act. Indeed, the list of medals and honors that appear to fall within the Act's protections is truly extensive. *See* www.usamilitarymedals.com for an exhaustive list of the medals. Similarly, an individual who claims to have been awarded a World War II Army of Occupation Medal, but actually was awarded a World War II Victory Medal would also be guilty of violating the statute.

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into discrete and separate sections would, for the purposes of discussion, be redundant.

2. Harmless Misrepresentations

The law covers speech even where a misrepresentation causes no harm. The Act contains no requirement that the misrepresentation actually cause any harm to anyone, much less the reputation or morale of the actual recipients of such awards and decorations or the military. The lack of a harm requirement is apparent in two primary ways. First, there is no textual requirement that anyone actually be deceived by the misrepresentation. Therefore, each and every listener may understand that a speaker is a chronic and pathological liar and that nothing the speaker says is truthful; but if the speaker claims to be a congressionally decorated veteran, he has violated the statute.

Additionally, the Act contains no requirement that a listener—even if actually fooled by a false claim to having received a military award—was tangibly harmed by that misrepresentation. There is no requirement under the Act that the listener lose anything of value or that the speaker gain anything. The Act contains no requirement that the listener actually rely on the misrepresentation by, for example, casting a vote that might otherwise be cast for another candidate or spending money in aid of someone claiming to be a struggling congressionally decorated veteran. The absence of a harm requirement is a notable feature of the statute, separating it from other varieties of statutes regulating misrepresentations, such as fraud statutes. *See, e.g.*, 18 U.S.C. § 1341. Indeed, there is nothing requiring that the

false claim harm the military, the recipients of the awards, or the reputation of the military—although these are all asserted justifications for the law.

3. Purely Private Speech

The statute punishes purely private speech. There is no requirement that the false representation be made in public. This raises the possibility that a person speaking with even one friend in the privacy of his own home, or a person sending a private letter to a confidant, could be prosecuted, found guilty, and imprisoned under the Act. In fact, the text of the Act does not even require that the speaker intend that anyone hear the claim at all.

4. Playful, Satirical, or Dramatic Claims

The text of the law makes no exception for playful, satirical, or dramatized claims of having received a military medal or award. By the Act's plain language, an actor in a theatrical performance could technically be found guilty of the statute. Famous recent representations of medals being awarded in films include Forrest Gump (Paramount Pictures 1994), Courage Under Fire (Fox 1996), and Saving Private Ryan (Amblin Entertainment et al. 1998). Any one of these depictions fall within the textual ambit of the statute. In fact, even a child pretending to be a war hero and medal recipient could be guilty under the language of the Act. In *Stevens*, this Court struck down a law as unconstitutionally overbroad even

though it contained an exceptions clause exempting depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." 18 U.S.C. § 48(b). The Stolen Valor Act does not even contain such an exceptions clause.

Also notable and disconcerting is the second part of § 704(b), which includes and punishes "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded ... any of the service medals or badges ... , the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item." The meaning of "colorable imitation" in this context is vague and unclear. Does colorable imitation encompass and punish conduct such as someone wearing a fake, but passable as real, Congressional medal and then asserting that he or she was awarded it? Or does "colorable imitation" encompass and punish those who may claim to have been awarded an entirely made up medal, such as a Blue Star, when it is a colorable imitation of a real medal?

C. Even if the Act Includes Certain Punishable Speech, It Must Be Ruled Unconstitutional Because of the Protected Speech that Would Also Be Prohibited

Given these four categories of protected speech that are rendered criminal by the Act—and the countless examples of conduct that falls under each—

this Court should hold that, even if the Court were inclined to rule that the statute has certain lawful applications, the Act as written and enacted is impermissibly overbroad. Although there may be a substantial interest in protecting the integrity of the medal system or in generally discouraging lies regarding military service, there is insufficient justification for the breadth of the Act. That is, although there may be substantial justification for a law that prohibits a candidate in a political contest from claiming to have been awarded a medal in order to help that candidate to raise funds and garner votes, there is insubstantial justification for punishing a comment made by mistake, punishing a comment made in a private conversation, or punishing a comment that was not intended to be believed.

The examples of protected speech swept within the text of the statute are not fanciful or unrealistic. Indeed, the misrepresentation spoken in private may be as common, or even more so, than the misrepresentation spoken in public strategically to gain a benefit. Although in raw numbers the number of instances of conduct where the application of the statute would be unconstitutional may be relatively low, the reality is that the number of permissible applications of the statute will likely be low as well. The plain language of the Act criminalizes speech that is probably relatively rare. However, the overbreadth analysis assesses the ratio of unconstitutional applications relative to the constitutional applications. *Hicks*, 539 U.S. at 119-20. In light of the scope of the

Act's language, this statute criminalizes a substantial amount of protected speech in relation to its legitimate sweep, if any.

D. The Government's Proposed Narrowing Construction Would Not Eliminate the Overbreadth of the Statute

The Government argues that this Court should construe the Act narrowly. For example, the Government requests that the Court read a *mens rea* requirement into the statute. Gov't Br., at 16. It further explains that parody, satire, and hyperbole are also not punishable under the statute because the Act's use of the term "representation" only covers a "presentation of fact." *Id.* at 17. To be sure, NACDL has long argued that "[i]n the absence of a clearly articulated nexus between a person's conduct and his mental culpability, criminal laws subject the innocent to unjust prosecution and punishment for honest mistakes or actions that they had no reason to know are illegal." Walsh & Joslyn, at vi. Thus, the Government is right to recognize that the language of the Act goes much too far and would have to be amended in order for the law to be even arguably constitutional.

But it is not clear that the Government can engraft these limitations onto this statute; the Government's concession that these should be part of the statute certainly does not make it so. *See, e.g.*, *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 252-53 (1999). Indeed, this Court has stated that it "will

not rewrite a ... law to conform it to constitutional requirements ... for doing so would constitute a serious invasion of the legislative domain, and sharply diminish Congress's incentive to draft a narrowly tailored law." *Stevens*, 130 S. Ct. at 1592 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997); *United States v. Treasury Emps.*, 513 U.S. 454, 479 n.26 (1995); *Osborne v. Ohio*, 495 U.S. 103, 121 (1990)).

And even if this Court could amend the statute as the Government suggests, the statute would still be unconstitutionally overbroad. The Government's reading of the statute does nothing to address the vagueness of "colorable imitation," the absence of a harm requirement, and the extent that the statute covers speech that is entirely private.

Further, even if the Court were to vastly narrow the scope of the statute as urged by the Government, there would remain serious concerns of whether the statute provides sufficient notice to the public. The very idea of notice is that people need to be able to easily find and understand the scope of conduct that is criminalized by a statute. If the Court were to narrow the statute in a way that eliminated the constitutional infirmities in this statute, it would require the public to not only look to the United States Code to access the statute, but also to the United States Reports to interpret its scope. Such an onerous requirement violates the very principle of notice: "a criminal statute [must] give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle

is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

E. Careful Exercise of Prosecutorial Discretion Is Insufficient to Cure the Constitutional Deficiencies

Although the Government argues that these examples are not likely to be actually prosecuted, the discretion to prosecute vests too great a power with the Government. In what seems to be a hallmark of such overbroad laws, the Government promises to use the law only in "carefully chosen prosecutions—where the Government can prove that the defendant's claim was false and that he was aware of its falsity—to deter all knowingly false claims to have received military honors." Gov't Br., at 55. In *Stevens*, this Court rejected this very notion—that prosecutors' discretion provides sufficient assurance that a broad statute will not be applied in unconstitutional situations. *Stevens*, 130 S. Ct. at 1591 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Moreover, the broad discretion the statute vests in the prosecutor—allowing the prosecutors' office on a case-by-case basis to decide whether certain conduct falls under the statute and is deserving of prosecution—is a grounds for finding it unconstitutional. As Justice Breyer

explained in his concurring opinion in *Morales*, a law "is unconstitutional ... [when] the [prosecutor] enjoys too much discretion in *every* case. And if every application of the [statute] represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." *City of Chicago v. Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring) (emphasis in original).

One may further argue that a jury provides an additional protection, but even if this were true, the price of prosecution in itself is too great a cost. The danger is not merely that a purported violator would be wrongfully convicted, but that he or she would be subject to all of the costs—financial, reputational, and emotional—attendant with governmental prosecution or investigation. Although someone prosecuted for engaging in protected speech may eventually prevail, whether before a jury or before a court of appeals, the costs will be substantial. Moreover, the greatest concern of the overbreadth doctrine is to guard against the chilling of protected speech; the risk of chilling protected speech is not diminished by the possibility that the prosecutor may elect not to bring suit, nor by the chance that a jury may acquit.

F. Case-by-Case Evaluation of the Constitutionality of the Act Does Not Protect Innocent Speakers from Prosecution

Nor is this statute one in which "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its

sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Given the personal and financial costs associated with defending a federal criminal action, and the numerous examples provided above in which applications of this statute would not be constitutionally permissible, it is unreasonable to require each litigant to individually challenge the law as applied to them.

In *Stevens*, this Court struck down on overbreadth grounds a law that had flaws that are strikingly similar to those present in the Stolen Valor Act. In fact, this law is an even stronger case for invalidation. In *Stevens*, there was a documented problem—specifically, "crush videos." Here, there are no congressional findings of a problem—for example, there is no evidence of a rise in lies about medals. Moreover, the law that was invalidated in *Stevens* contained an exceptions clause for works of artistic value. This law contains no exceptions clause. Both the Stolen Valor Act and the law invalidated in *Stevens* were vague in key respects—in *Stevens* as to the meaning of cruelty to animals, and here as to the meaning of "colorable imitation." And in both cases the Government promised to address the vast breadth of the statute by using it only responsibly.

* * *

In sum, an overbreadth analysis is especially appropriate for analyzing the Act. Due to its broad reach and unnecessarily expansive scope, the Act runs a strong risk of deterring constitutionally protected

speech. As the Court explained in *Gooding*, the animating fear at the heart of the overbreadth doctrine is that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding*, 405 U.S. at 520-21. Here, because of the possibility for ambiguity and uncertainty over the statute, in light of its broad language and expansive scope, the statute may chill permissible speech.

Thus, this Court should strike down the statute based on its "embracing sweep ... over protected expression." *New York v. Ferber*, 458 U.S. 747, 771-72 (1982). The Stolen Valor Act encompasses broad categories of speech that may not be constitutionally regulated. Requiring case-by-case challenges to the law would be burdensome to future litigants and potentially to the courts, as well as place an inappropriate degree of discretion with prosecutors.

III. The Court Should Rule the Law Unconstitutional Because It Is Not Supported by a Sufficient Governmental Interest

The Court should hold that there is insufficient governmental interest to support such a broad law. As the preliminary question in the analysis, this Court will need to decide what level of scrutiny is appropriate for analyzing the statute. The Government advocates for intermediate scrutiny with a breathing-room analysis, and the Respondent advocates for strict

scrutiny. Ultimately, irrespective of what level of scrutiny the Court determines is appropriate, the Court should strike down the law because there is insufficient governmental interest in regulating this type of speech.

There are three potential government interests to justify the Stolen Valor's Act restrictions on speech. Each of these justifications is deeply problematic.

A. Protecting the Honors System Is an Insufficient Justification

First, the Government justifies the Act based on a need to protect the integrity of the medal system. The Government claims an interest in "protecting the reputation and integrity of its military honors system against knowingly false claims. Military awards serve as public symbols of honor and prestige, conveying the Nation's gratitude for acts of valor and sacrifice; and they foster morale, mission accomplishment, and *espirit de corps* within the military." Gov't Br., at 14. The Government further explains that "[f]alse claims to have received military awards undermine the system's ability to fulfill these purposes. In the aggregate, false claims make the public skeptical of all claims to have received awards, and they inhibit the government's efforts to ensure that the armed services and the public perceive awards as going to only the most deserving few." *Id. Amici* Congressional Medal of Honor Foundation makes a similar argument that the "prestigious status associated with the Medal of

Honor, and its power to inspire emulation, is at its peak when our Nation is at war, such as now. Moreover, in our civilian population, the values that imbue the Medal of Honor have never been in higher demand or had such a pronounced need for preservation." Brief of *Amici Curiae* Congressional Medal of Honor Foundation, at 18.

The idea that, but for the Act, the medals and the values they signify would be diminished has several flaws. This argument was convincingly rejected by the District Court in Colorado in another Stolen Valor Act case. That court explained:

> To suggest that the battlefield heroism of our servicemen and women is motivated in any way, let alone in a compelling way, by considerations of whether a medal may be awarded simply defies my comprehension. Indeed, the qualities of character that the medals recognize specifically refute the notion that any such motivation is at play. I find it incredible to suggest that, in the heat of battle, our servicemen and women stop to consider whether they will be awarded a medal before deciding how to respond to an emerging crisis. That is antithetical to the nature of their training, and of their characters. Servicemen and women may be motivated to enlist and fight by the ideals the medals represent, but I give no credence to the notion, and, more to the point, the government has offered no evidence in support of its burden to prove, that the medals themselves provide potential recipients any incentive to act to protect their

> comrades-at-arms or the interests of this nation they have sworn to defend.

United States v. Strandlof, 746 F. Supp. 2d 1183, 1190-91 (D. Colo. 2011).

Further, promoting and protecting a medal system can be accomplished easily through other methods, such as more speech. If the concern is that misrepresentations about military honors is diminishing the honors system, minimizing the impact of those lies can be achieved in one of two ways: by suppressing or preventing lies, which is what the Stolen Valor Act aims to accomplish, or by counter-speech, which is the method historically favored over censorship. Counter-speech can take two forms. Individuals who falsely claim to have received a medal can be exposed by speech denying such an achievement. There are examples of counter-speech working in precisely this context. *See Phoenix Publisher Admits Lies, Resigns*, Los Angeles Times, Dec. 27, 1985, *available at* http://articles.latimes.com/1985-12-27/news/mn-25470_1_phoenix-gazette (last visited Jan. 17, 2012).

Second, at a broader level, positive speech about the significance of these honors can be promoted. In other words, if the Government is truly concerned about the diminishing value of the honors, there is no reason that addressing and punishing those making misrepresentations is the best way to accomplish that goal. The Government could accomplish this goal by promoting a campaign (or campaigns) about the value of the medals and the heroism they embody. For

example, the Government could invest in a database with biographies of the medal winners. Promoting the meaning of these medals and the heroes who were awarded them would do more to honor these individuals and the values they embody than criminalizing misrepresentations.

B. Avoiding the Harms Caused by False Representations about Military Honors Is an Insufficient Justification

Next, some *amici* attempt to justify the Act as necessary to avoid the harm caused by any misrepresentations. This theory is presented in two different forms by several *amici* in support of the Government.

1. Harm to the Listener

One iteration of the harm that the statute aims to curb is the "harm of knowing falsehoods about military honors to listeners who are defrauded by such falsehoods." Brief of Professors Eugene Volokh and James Weinstein as *Amici Curiae* in Support of Petitioner, at 33. Veterans of Foreign Wars also argue, "This case is about theft." *Amicus Curiae* Brief of Veterans of Foreign Wars of the United States et al., at 8. *Amici* Volokh and Weinstein argue that the falsehoods cause harm when people hear and rely upon the lie.

The statute, however, does not require, as an element, that the Government prove any such harm to or reliance by the listener. Indeed, as argued above,

there is no harm requirement whatsoever in the statute. Other statutes criminalize lies or misrepresentations only when there is proof that actual harm, or at least an intent to cause harm, is shown. *See, e.g.*, 18 U.S.C. § 1306 (requiring an intent to defraud). This statute simply does not.

Moreover, a falsehood about the receipt of a military honor is not the type of misrepresentation that is inherently harmful to the public. Some laws, such as those criminalizing impersonating a police officer, are justified based on public safety. Wearing a police uniform, or driving a car with sirens, places great authority and coercive power with an individual. Further, in case of an emergency, the public needs to be able to trust the authority that comes with a police officer's uniform without second-guessing whether the individual is truly an officer. To avoid improper use of this coercive power it is necessary to regulate who can wear the uniform. Even given such considerations, the laws regulating the false impersonation of a police officer are written more narrowly than the Stolen Valor Act, requiring at the minimum an actual intent to fraudulently impersonate and more often a requirement that the false representation be conducted with the "purpose to induce another to submit to his or her pretended official authority or to rely upon his or her pretended official acts." Mo. Rev. Stat. § 575.120; La. Rev. Stat. § 14:112.1 ("False personation of a peace officer is the performance of any one or more of the following acts with the intent to injure or defraud or

to obtain or secure any special privilege or advantage."); 21 Okla. Stat. § 264.A (accord).

No such public harm justification can be made for the Act because no presumption of public reliance can be asserted. Falsely believing that someone earned the prestige and honor of a medal is fundamentally different from falsely relying on the authority of a police uniform. In those cases where there is a "public harm" justification for the statute, other criminal laws already cover such conduct.

2. Harm to Medal Recipients

The second type of harm asserted by some supporters of the law is distinct from any reliance argument. Rather, the theory here is that the statute is justified to avoid harming those who actually received these medals, and whose honor may be diminished or degraded when others falsely claim them. This theory is best presented in the *amicus curiae* brief of the Legion of Valor of the United States: "Military medals are a kind of government-issued currency of valor. They represent an official recognition of exemplary service which most people in this country honor and respect. There is a loss, however intangible, when fakers claim honors they have not earned, especially when they can do so with impunity." Brief *Amici Curiae* of the Legion of Valor of the United States et al., at 11; *see also* Brief of Veterans of Foreign Wars, at 20.

The dilution argument again fundamentally misconstrues the meaning and value of these medals. The winners of awards such as the Medal of Honor *are* heroes. The honors that they have earned, based on these historic acts, are not something that can ever be diluted. The idea that the "currency," to borrow *amici*'s word, can ever be diluted relies on an idea that the honors are part of a zero-sum game. The only way one person falsely claiming an honor would dilute another person's honor and valor would be if honor and valor is some sort of finite reservoir and that when one person wrongfully "drinks" out of that reservoir there is less of a supply for those who are truly entitled. But again, this seems antithetical to the very idea of these medals. There is no finite supply. The honor offers an intrinsic recognition of the great heroism and bravery of the recipients. Nothing can dilute this recognition. Rather, the discovery that someone would make a false claim to a military medal suggests the exact opposite is true: the medals are so valuable that some would risk losing their credibility to claim that status. Most importantly, this is all theoretical; there is no evidence that false claims of military value are so frequent as to have the slightest effect in diluting admiration for acts of valor.

Notably, several of the *amici* include (without distinguishing) those who falsely claim military service, not just medals. *See* Brief *Amici Curiae* of the Legion of Valor, at 11 ("The FBI estimates that for every legitimate Navy SEAL team member, there are roughly 300 imposters."); Brief of Veterans of Foreign

Wars, at 13-15 (citing numerous instances of those who falsely claimed military service without distinguishing them from those who falsely claimed medals). Indeed, this theory of harm would extend not only to those awarded medals but to those who falsely claim prior military service. In fact, this harm theory would extend to those who claim any type of service—whether it is community service, pro bono legal service, or local law enforcement service. Just as one could argue that the currency of a medal is degraded by those who falsely claim that they earned it, so too could one argue that the currency and respect that comes with other types of service are degraded by undeserving individuals claiming them.

Finally, it is concerning the extent to which this dilution of the currency of the medals argument may be indistinguishable from simply punishing the speech because it is offensive and unpopular. Any regulation of speech based on the offensiveness of the speech could be justified based on that offensiveness diluting the topic of the speech. For example, laws regulating offensive speech about the civil rights movement or the founding fathers of this country or members of the Supreme Court could all be justified on the need to avoid diluting the accomplishments of the great individuals involved. Such a justification, based on the offensiveness of the speech, as briefly argued below, clearly runs afoul of what is constitutionally permitted.

C. The Law Cannot Be Justified Based on the Offensiveness of the Speech

Third, another justification to support the Act is that false representations disrespect the military, a fundamental institution of extreme national importance as well as national service. In essence, this argument is that the Government wants to ban such speech (falsely claiming to be a medal recipient) because it finds such claims particularly offensive and wrong. A justification based on the offensiveness of the speech, however, would have no basis in constitutional jurisprudence. As this Court repeatedly has stated: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

CONCLUSION

As the district court observed in *Strandlof*, "[w]hat the Supreme Court stated in relation to the impregnable symbolism of the American flag is equally true of the reputation, honor, and dignity of our nation's military decorations: ... 'We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.'" *Strandlof*, 746 F. Supp. 2d at 1191 (citing *Johnson*, 491 U.S. at 419). Those individuals, whose valor is recognized and saluted through the receipt of

these awards, medals, and decorations, fought for certain ideals, among them the freedom of speech and self-expression. By holding firm to these cherished ideals, we honor the military heroes who fought to protect them. The Stolen Valor Act is a misguided attempt to protect these honors. Imprisonment of individuals under a law that contains no *mens rea*, no public speech or harm requirement, and provides no exceptions for satire or artistic performance does not further the stated goals of the Act—it undermines them. Criminal punishment must be reserved for those who are truly deserving and should be done through carefully crafted legislation, especially when the law regulates speech based on its content. For all these reasons, the Stolen Valor Act, which is both unconstitutionally overbroad and not backed by a sufficient governmental interest, should be struck down.

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BRIEFS

No. 11-210

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY-THREE NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici, described in Appendix A, are The Reporters Committee for Freedom of the Press and twenty-three of the nation's leading news organizations – Advance Publications, Inc., The American Society of News Editors, The Associated Press, Cox Media Group, Inc., Daily News, L.P., Dow Jones & Company, Inc., The E.W. Scripps Company, Gannett Co., Inc., Magazine Publishers of America, The McClatchy Company, The Media Institute, The National Press Club, The National Press Photographers Association, The New York Times Company, The Newspaper Guild – CWA, NPR, Inc., ProPublica, The Online News Association, The Radio Television Digital News Association, The Society of Professional Journalists, Tribune Company, The Washington Post, and WNET.

Amici write to make clear that the issues in this case go far beyond the fate of a serial prevaricator like Xavier Alvarez and strike at the heart of press freedom. The Government's defense of the Stolen Valor Act recalls the time before *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Near v. Minnesota*, 283 U.S. 697 (1931), when newspapers were prosecuted for publishing what the government called "false reports." *Schaefer v. United States*, 251 U.S. 466 (1920). It proposes making broad exclusions from constitutional protection more the rule than the

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[1] Both parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

exception, thus reversing the basic presumption of the First Amendment.

Amici have extensive experience with effective ways to expose false claims of military honors that do not involve unraveling decades of constitutional jurisprudence. Honoring the principle that the best remedy for false speech is "more speech, not enforced silence," *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), the press has worked to discover and publicly shame people who claim false decorations – especially those, like Alvarez, in positions of public trust.

INTRODUCTION

This nation owes an extraordinary debt of gratitude to its military heroes – especially our fallen heroes – whose valor is symbolized by military decorations. Because of this, it may be tempting to weaken constitutional principles to permit prosecution of a scoundrel like Alvarez, who dishonors their service by falsely claiming to be one of them. But it would devalue military sacrifices even more to limit freedom for this reason, because failure to understand and apply core constitutional precepts in cases involving the least worthy among us inherently undermines principles needed to safeguard the most worthy.

It therefore is essential that the First Amendment protect even the "distasteful abuse of a privilege" in order to preserve "these fundamental social values." *Cohen v. California*, 403 U.S. 15, 25 (1971). This Court has explained that "the law of free expression is one of vindication in cases

involving speech that many citizens find shabby, offensive, or even ugly." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826 (2000). Thus, history has shown that "safeguards of liberty have often been forged in controversies involving not very nice people." *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) (citation omitted), *aff'd*, 131 S. Ct. 1207 (2011). And so it is here.

Our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" means that the government cannot be the arbiter of truth. *New York Times*, 376 U.S. at 270. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth" because, as James Madison wrote, "[s]ome degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." *Id.* at 271 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)). Consequently, First Amendment protection presumptively extends to "exaggeration . . . and even to false statement" except in rare and well-defined circumstances where limitations can be justified. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

SUMMARY OF ARGUMENT

I. The Stolen Valor Act is presumptively unconstitutional as a content-based regulation of pure speech. The government seeks to uphold the law by purporting to find a broad exception to First Amendment protection for any knowingly false

statement of fact. According to this argument, such statements are devoid of constitutional protection except as necessary to provide "strategic protection" to avoid chilling "fully protected speech." Brief of Petitioner United States of America ("Gov't Br.") at 20. This theory of the First Amendment would undermine press freedom by adopting an exclusion from protection as its central premise, thus reversing the basic presumption against official oversight of expression. The government's theory fails to grasp that this Court's First Amendment jurisprudence has consistently limited such exceptions, and its backward reasoning creates what this Court most recently rejected – "a free-floating test for First Amendment coverage" that is "startling and dangerous." *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

This expansive view of First Amendment exceptions ignores the key events that have defined press freedom. Were this Court to accept the government's premise, it would mark a return to constitutional doctrine amenable to such abuses as the Sedition Act prosecutions during the administration of John Adams and the World War I Espionage Act cases, in which the "bad tendency" of false speech to cause social ill was sufficient to support censorship. This also would open the door for broad new classes of unprotected speech in which the only limiting principle is whatever degree of "instrumental protection" the government believes is enough to protect "speech that matters."

II. The purposes of the Stolen Valor Act are better served by reliance on the marketplace of ideas

than by criminalizing pure speech. As Alvarez and others like him have learned to their peril, veterans groups, medal winners, and the press work tirelessly to expose false claims of heroism. These efforts have been aided of late by creation of online databases of legitimate winners such as the Hall of Valor operated by Gannett's MILITARY TIMES newspapers. These same groups also expose instances when the *government* itself is lying about medal winners.

Public policy nevertheless may play a constructive role. It can support and incentivize projects that expose fakes. It can keep better public records of medal winners, so that verifying claims requires something short of a Freedom of Information Act request. And it can beef up efforts to enforce laws against lying about military honors as part of a fraudulent scheme. What it *cannot* do is prohibit speech because, in the government's estimation, the speech lacks sufficient merit.

ARGUMENT

I. DENYING GOVERNMENT AUTHORITY TO PRESCRIBE TRUTH AND PUNISH FALSITY IS ESSENTIAL TO PRESS FREEDOM

A. The Stolen Valor Act Makes False Statements a Crime *Per Se*

Section 704(b) of the Stolen Valor Act imposes criminal penalties on any person who falsely represents, "verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States," including "any colorable imitation" thereof.

18 U.S.C. § 704(b). Enhanced penalties are imposed for violations involving certain medals, including the Medal of Honor. *Id.* § 704(c), (d). The law's purpose is to "protect the reputation and meaning of military decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), (3), 120 Stat. 3266, 3266 (2006).

The Ninth Circuit thus correctly characterized Section 704(b) as a content-based regulation of pure speech. The Stolen Valor Act "imposes a *criminal* penalty of up to a year of imprisonment, plus a fine, for the *mere utterance or writing* of what is, or may be perceived as, a false statement of fact – without anything more." *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010). The court of appeals found no apparent reason "for assuming, without specific proof, that the reputation and meaning of military decorations is harmed every time someone lies about having received one," but the law requires no showing that the false statement was in fact publicized or had any actual victims. *Id.* at 1210.

Defending the law, the government asserts "Congress historically has acted to protect military awards from misappropriation" because "it is common sense that false representations have the tendency to dilute the value and meaning of military awards." Gov't Br. at 54. In this regard, the Stolen Valor Act revives the long-discredited "bad tendency" doctrine, under which the social harm of the speech Congress chose to prohibit simply is presumed. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 670 (1925).

That doctrine played a central role in the Espionage and Sedition Act prosecutions during World War I, prompting preeminent scholar Zechariah Chafee to observe that "revival of the doctrines of bad tendency and constructive intent always puts an end to genuine discussion of public matters." Zechariah Chafee, Jr., FREE SPEECH IN THE UNITED STATES 51 (1941). Accordingly, this Court has long since held the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969). As a consequence, the Stolen Valor Act is presumptively unconstitutional.

B. The Stolen Valor Act Reverses the First Amendment's Presumption and Makes the Government the Arbiter of Truth

1. The First Amendment Was Adopted to Deprive Government Authority Over "Truth"

The earliest lessons of our republic confirmed the government could neither be trusted to protect only "truth" nor empowered to punish "falsity." The Sedition Act of 1798 made it a crime to "write, print, utter or publish ... any false, scandalous and malicious writing or writings against the government" with the intent to defame Congress or the President. Sedition Act of 1798, 1 Stat. 596. Although the law permitted truth as a defense, it was used aggressively to punish political opponents of the Adams Administration.

The Sedition Act "was less a piece of legislation than an act of vengeance by federalist lawmakers who decided to strike back at the republican newspapers that they felt had been demonizing their intentions and slandering their character for far too long." Eric Burns, INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM 356 (2006). Sedition Act prosecutions were instituted against editors of newspapers in major cities like Philadelphia, New York and Boston, as well as in smaller towns in Connecticut and Vermont. Philip I. Blumberg, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC 101 (2010). Of the ten people convicted under the Act, seven were journalists, and one other editor was tried but acquitted. *Id.* *See also* Burns, *supra*, at 362. As a result, five republican papers were shuttered or ceased publication for at least some period during this time. Blumberg, *supra*, at 101.

Many of these prosecutions were prompted by partisan rants, but others were predicated on reports of "false" factual statements.[2] After all, the law on its face clearly permitted prosecution of "false state-

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[2] William Duane, editor of the Philadelphia *Aurora*, was summoned before the Senate to answer Sedition Act charges because he published the details of a leaked draft of a federalist bill that would have effectively superseded the Electoral College, and, unfortunately, "got some of his facts wrong." Blumberg, *supra*, at 119-20. Charles Holt, editor of the *New London Bee*, defended against Sedition Act charges by arguing he had published only opinion protected by the Constitution. He nevertheless was convicted and the *Bee* ceased publication while Holt was imprisoned. *Id.* at 113.

ments," and, as Representative John Allen of Connecticut explained in advocating its passage, the Act was necessary to punish publication of "the most shameless falsehoods against the Representatives of the people of all denominations." Burns, *supra*, at 357.

These prosecutions illustrated vividly "how speedily an Act to protect national security at a time when an administration perceives the country to be on the brink of war can be used to suppress freedom of speech." Blumberg, *supra*, at 99. The experience prompted certain Framers, including Madison and Jefferson, to articulate a broad theory of freedom of expression to explain the meaning of the First Amendment. Leonard Levy, LEGACY OF SUPPRESSION 258-65 (1960). Such reactions exposed "the frailty of the argument that freedom of political expression implied freedom for 'truth' only." *Id.* at 263.

The Sedition Act expired by its own terms on the last day of the Adams Administration and was never tested in court, but the consensus of history is that it was fundamentally at odds with the First Amendment. As Thomas Jefferson put it as he pardoned and remitted the fines of those convicted under the law, "I considered ... that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." 4 JEFFERSON'S WORKS 555-56 (Washington ed.) (Letter to Abigail Adams, July 22, 1804). This experience with the federal government's initial effort to criminalize false speech "first crystallized a national awareness of the central meaning of the

First Amendment." *New York Times*, 376 U.S. at 273.

As it laid the foundation for modern First Amendment jurisprudence, this Court made clear that the government cannot be the arbiter of truth. In *Near*, 283 U.S. 697, it struck down a law that permitted the suppression of malicious, scandalous and defamatory newspapers, magazines or other periodicals. The case involved an injunction barring the publication of a "scandal sheet" called *The Saturday Press*, in which "[m]any of the statements are so highly improbable as to compel a finding that they are false," and "[i]n every edition slanderous and defamatory matter predominates to the practical exclusion of all else." *Id.* at 724 (Butler, J., dissenting).

The statutory scheme was deemed "the essence of censorship" despite the fact it permitted the publisher to defend challenged news stories as "true and ... published with good motives and for justifiable ends." *Id.* at 713. *Near* is remembered primarily as the leading authority for the constitutional restriction on prior restraint, but is not limited to that proposition. This Court explained that the First Amendment is more expansive than the Blackstonian conception of press freedom as merely the absence of prior restraint. *Id.* at 713-14. It quoted James Madison's statement reacting to the Sedition Act that "[s]ome degree of abuse is inseparable from the proper use of everything," and noted that the preliminary freedom from restraint "extends as well to the false as to the true." *Id.* at 714, 716 (citations omitted).

This theme was further developed in *New York Times Co. v. Sullivan* where this Court made clear that false statements, standing alone, do not lack constitutional protection. In that case, it was undisputed in the underlying defamation claim that defendants had published a number of false factual statements. 376 U.S. at 258-59. But this Court observed that it has consistently "refused to recognize an exception for any test of truth" because "erroneous statement is inevitable in free debate." *Id.* at 271. It acknowledged certain categories of speech may lack protection, but stated the government cannot claim "talismanic immunity" from constitutional limitations simply by asserting certain speech falls within a designated category. Instead, any such exception "must be measured by standards that satisfy the First Amendment." *Id.* at 268-69.

Applying these lessons, the Ninth Circuit correctly reasoned that "the right to speak and write whatever one chooses – including, to some degree, worthless, offensive, and demonstrable untruths – without cowering in fear of a powerful government is ... an essential component of the protection afforded by the First Amendment." *Alvarez*, 617 F.3d at 1205. Chief Judge Kozinski observed that criminalizing pure speech simply because it is false would leave "wide areas of public discourse to the mercies of the truth police," a prospect he aptly described as "terrifying." *United States v. Alvarez*, 638 F.3d 666, 673, 674 (9th Cir. 2011) (denying motion for rehearing and rehearing en banc) (Kozinski, C.J., concurring).

2. First Amendment Freedoms Must be Interpreted Broadly and Exceptions Construed Narrowly

From 1791 to the present, the First Amendment has permitted content restrictions on speech only in a few well-defined and narrowly limited classes of speech, and this Court recently disclaimed any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 130 S. Ct. at 1584, 1586. *See Brown v. Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011). In this case, the Ninth Circuit followed *Stevens* and held false factual speech is not a general category of unprotected speech unto itself. *Alvarez*, 617 F.3d at 1206.

Cognizant of this recent precedent, the government asserts "false statement of fact" is not a "new" category of unprotected expression, but instead is merely the generalized label for a broader category that includes traditional examples like fraud and defamation. Gov't Br. at 19-21. The government nods to *Stevens* and *Brown* and allows that "the broad general category of false factual statements has not historically been treated as completely unprotected by the First Amendment," but claims such speech is presumptively without constitutional immunity except for what it calls "limited instrumental protection" necessary for First Amendment "breathing space." *Id.*

The government reaches the wrong conclusion in this case because it begins with the wrong premise. It reasons not from the central command of the First Amendment, that "Congress shall make no law ...

abridging the freedom of speech, or of the press," but from what it believes to be a broad *exception* to that rule.

The government's theory ignores that the First Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263 (1941). Its ability to restrict speech "is the exception rather than the rule" and "penalizing ... utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." *Herndon v. Lowry*, 301 U.S. 242, 258 (1937). This means "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges*, 314 U.S. at 263.

By generalizing and thereby expanding categories of unprotected speech, the government's approach contradicts both the logic and historical trend of this Court's First Amendment jurisprudence. Ever since a number of categories of unprotected speech first were listed in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), they have been progressively narrowed and limited as each subject area was "constitutionalized." This Court has since eliminated most "unprotected" categories articulated at the time of *Chaplinsky*. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (blasphemy); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (insulting polemical speech); *Cohen v. California*, 403 U.S. 15 (1971) (offensive or "profane" speech); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*

Council, Inc., 425 U.S. 748 (1976) (commercial speech). For those few that remain, speech is presumptively protected unless the government can clear high constitutional hurdles to prove otherwise. *E.g.*, *New York Times*, 376 U.S. at 283-84; *Roth v. United States*, 354 U.S. 476, 487-88 (1957); *Brandenburg*, 395 U.S. at 447-49.

The government asks this Court to invert this process. It starts with a broad category of false speech that it claims is beyond the First Amendment's reach and then adds back some limited protections on an ad hoc basis. This is illustrated by the dissent's statement below that "the general rule is that false statements of fact are not protected by the First Amendment" but that some important exceptions must be recognized "to protect speech that matters." *Alvarez*, 617 F.3d at 1220-21 (Bybee, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)). This theory cannot be reconciled with the uniform trend of this Court's rulings by which the unprotected categories of speech were rendered substantially narrower and more specific.

This reversal of the First Amendment's basic presumptions places the government in the position of defining not just what is "false," but also what speech has sufficient merit to be given "limited instrumental protection." Contrary to the government's inverted theory, the presumed value of speech cannot be a general precondition to First Amendment protection. This is because "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or

artistic value' (let alone serious value), but it is still sheltered from government regulation." *Stevens*, 130 S. Ct. at 1591. The Ninth Circuit thus correctly rejected this theory as "turning customary First Amendment analysis on its head." *Alvarez*, 617 F.3d at 1204.

3. Exceptions to First Amendment Protection for Untruthful Speech Require Falsity "Plus"

The government's defense of the Stolen Valor Act is based largely on misreading dictum in *Gertz* that "there is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340. Notwithstanding such language, restrictions on libelous statements as well as speech in other unprotected categories still "must be measured by standards that satisfy the First Amendment." *New York Times*, 376 U.S. at 268. As this Court more recently explained, statements of this sort "do not set forth a test that may be applied as a general matter to permit the government to imprison any speaker so long as his speech is deemed valueless or unnecessary." *Stevens*, 130 S. Ct. at 1586.

It is not enough for a statement to be false or even knowingly false to exclude it from First Amendment protection. This Court "has never held that a person can be liable for defamation merely for spreading knowingly false statements." *Alvarez*, 617 F.3d at 1209. First Amendment exceptions for untruthful speech, such as defamation or fraud, exist not just because the expression is false, but because of some demonstrable harm. *Id.* at 1206-09.

Gertz underscores this point. The Court stressed that the state interest underlying the law of libel "is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz*, 418 U.S. at 341. The case involved no question of whether "false" speech is protected by the First Amendment, but addressed only whether the *New York Times* actual malice standard applies to defamation cases brought by persons who are neither public officials nor public figures. Even in that context, the Court made clear that proof of actual injury is necessary "to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment." *Id.* at 349. Thus, proof of personal injury is not just an element of the tort, it is constitutionally required.

This is true of all "unprotected" categories of speech. The First Amendment requires *all* elements of the relevant test to be met as a threshold matter *before* any speech may be relegated to an unprotected category. The government's "breathing space" theory gets it backwards by reasoning that certain types of speech are unprotected because they lack constitutional "value," but that "strategic protections" may be recognized for "speech that matters."

This approach hardly provides "breathing space."[3] For example, it would be incorrect to assert sexually

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[3] In every other case where this Court has construed the First Amendment as requiring "breathing space," it has expanded protections. *E.g.*, *New York Times*, 376 U.S. at 271-72; *NAACP v. Button*, 371 U.S. 415, 433 (1963). Here, the

explicit speech lacks First Amendment protection, but that, in order to provide "breathing space," case law requires the government to prove the work as a whole appeals to the prurient interest, that it violates contemporary community standards, and that it lacks serious literary, artistic, political, or scientific merit. *Miller v. California*, 413 U.S. 15, 24 (1973). Rather, the elements of the obscenity test are "specific prerequisites" to a prosecution. *Id.* at 27. As this Court has explained, "sex and obscenity are not synonymous" and the portrayal of sex alone "is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Roth*, 354 U.S. at 487. *See also Reno v. ACLU*, 521 U.S. 844, 873-74 (1997) (all three elements of obscenity test are essential to limit its "uncertain sweep").

Likewise, speech does not constitute "incitement" until the government proves advocacy was intended to provoke imminent lawless action *and* such imminent action is likely. *Brandenburg*, 395 U.S. at 447-49. Mere words of incitement are not enough.

For the same reason, falsity alone is insufficient to eliminate the presumption of First Amendment protection for pure speech. The government claims "the First Amendment permits false-statement restrictions in a variety of contexts," Gov't Br. at 21, but each of them, including fraud, intentional infliction of emotional distress, and false-light

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government tries to use the concept to shrink the First Amendment's presumptive reach.

invasion of privacy, requires proof of actual injury.[4] Likewise, laws about perjury or fraudulent administrative filings "require at a minimum that the misrepresentation be willful, material, and uttered under circumstances in which the misrepresentation is designed to cause an injury, either to the proper functioning of government ... or to the government's or a private person's economic interests." *Alvarez*, 617 F.3d at 1211.

The injury the Stolen Valor Act tries to remedy is of an entirely different nature. The law was passed "to protect the reputation and meaning of military decorations and medals," Stolen Valor Act, § 2, 120 Stat. 3266, but this asserted interest cannot justify restrictions on freedom of expression. While this Court has acknowledged the government may "create national symbols, promote them, and encourage their respectful treatment," it has also held that the First Amendment prohibits restricting speech to preserve their intended meanings. *United States v. Eichman*, 496 U.S. 310, 318 (1990). *See also Texas v. Johnson*, 491 U.S. 397, 417 (1989) ("We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents."); *Schacht v. United States*, 398 U.S. 58, 63 (1970). It therefore rejected the argument that

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[4] *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) ("False statement alone does not subject a [speaker] to fraud liability."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 51-53 (1988) (constitutional limits on defamation also restrict claims for intentional infliction of emotional distress); *Time, Inc. v. Hill*, 385 U.S. 374, 394-96 (1967) (constitutional limits on damages articulated in defamation cases also apply to false light invasion of privacy).

"flag-burning as a mode of expression, like obscenity or 'fighting words,' does not enjoy the full protection of the First Amendment." *Eichman*, 496 U.S. at 315.

The same logic applies here. The government may have an undoubted interest in preserving the meaning of military honors, particularly within the military itself, but that does not mean that it may use criminal law to compel that result.[5] "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable or defensible boundaries." *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189-90 (D. Colo. 2010) (quoting *Johnson*, 491 U.S. at 2546-47). Thus, the type of false statements proscribed by the Stolen Valor Act do not qualify for exclusion from First Amendment protection.

C. The Government's Open-Ended Test for Punishing False Speech Would Eviscerate Press Freedom

Upholding the Stolen Valor Act under the government's "breathing space" theory would strike at the heart of press freedom by heralding a return to

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[5] *Johnson*, 491 U.S. at 418 ("To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest."). The government's interest, and the constitutionally permissible tools at its disposal, differ within the military command structure compared to civilian life. *E.g.*, *Parker v. Levy*, 417 U.S. 733, 758-61 (1974) (speech in the military environment does not receive full First Amendment scrutiny).

the early First Amendment jurisprudence of this Court's post-World War I Espionage Act cases. Newspaper publishers and others were convicted, and the convictions upheld prior to development of current constitutional doctrine, for publishing "false reports" that might have a tendency to impede the war effort. The government's expansive view of First Amendment exceptions not only would revive the potential for such prosecutions, it would pave the way for broad new classes of unprotected speech.

In 1920, this Court upheld the conviction of a German-language newspaper for violating an Espionage Act provision prohibiting willfully making and conveying "false reports and statements with intent to interfere with the military and naval operations and success of the United States and to promote the success of its enemies." *Schaefer v. United States*, 251 U.S. 466, 469 (1920). *See also Pierce v. United States*, 252 U.S. 239 (1920) (conviction upheld for false statements in anti-draft pamphlets).

The charge in *Schaefer* stemmed from a number of articles and editorials the government alleged contained statements that were "deliberate and willfully false" intended to represent "that the war was not demanded by the people but was the result of the machinations of executive power."[6] As with

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[6] *Schaefer*, 251 U.S. at 478, 481. The charge of making false statements rested primarily on errors or omissions in translating English language reports to German. In one instance, the newspaper translated a speech by Senator Robert La Follette as mentioning "brotriots" (bread riots) rather than

the Stolen Valor Act, it was unnecessary for the government to show any actual harm or adverse impact on the war effort – "the tendency of the articles and their efficacy were enough for offense." *Schaefer*, 251 U.S. at 479.

Justices Brandeis and Holmes in dissent wrote that such prosecutions for false news items were reminiscent of the days "when men were hanged for constructive treason" and will "doubtless discourage criticism of the policies of the Government." *Id.* at 493-94 (Brandeis, J., dissenting). They would have required the government to meet a more demanding First Amendment standard, requiring proof of a "clear and present danger" – a nascent form of strict scrutiny for its day. *Id.* at 486; *Pierce*, 252 U.S. at 271 (Brandeis, J., dissenting). Although neither *Schaefer* nor *Pierce* has been overruled formally, the principles of the Brandeis-Holmes dissent became controlling as First Amendment doctrine evolved. *Brandenburg*, 395 U.S. at 447-49.

The government's "breathing space" theory would not just halt such evolution, it would turn back the clock to a time when false reports were presumed to be outside the First Amendment's protective umbrella. Little would be left of press freedom if the government could again prosecute criticism of official policies to the extent news reports contain what the government alleges to be deliberate false statements of fact. The government's jaundiced conception of

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"brotreihen" (bread lines). *See id.* at 486-93 (Brandeis, J., dissenting).

"breathing space" paradoxically would suck all the oxygen from the marketplace of ideas.

The Solicitor General does not discuss the Espionage Act cases, but *amici* supporting the government suggest that cases like *Schaefer* "should ... come out in favor of First Amendment protection today." Brief of Professors Eugene Volokh and James Weinstein as *Amicus Curiae* in Support of Petitioner ("Professors' Br.") at 25. No doubt, such cases *should* come out differently than before. But it is possible to be confident they *would* only if this Court rejects the government's "breathing space" formulation as well as the various theories offered by supporting *amici*.[7]

What the government now labels "breathing space analysis" is every bit as "freewheeling" as the balancing test for unprotected speech proposed – and overwhelmingly rejected – in *Stevens*. Under this new theory, the government would be able to prohibit speech whenever: (1) "the government has a strong interest in restricting the false statements;" (2) the reviewing court considers whether "the restriction risks chilling protected speech;" and (3) the restriction extends no further than necessary to protect the government interest at stake. Gov't Br.

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[7] For example, *Amici* Professors argue First Amendment exemptions should be made "capacious" so as to forestall an increasing number of demands for new exceptions. Professors' Br. at 14-18. This odd "destroy the village in order to save it" theory of the First Amendment ignores that this Court has had no difficulty in seeing demands to create new exceptions for what they are, and soundly rejecting them. *Stevens*, 130 S. Ct. at 1584, 1586; *Brown*, 131 S. Ct. at 2734.

at 28. As in *Stevens*, this is "a free-floating test for First Amendment coverage" based on "ad hoc balancing of relative social costs and benefits." And, as before, it is "startling and dangerous." *Stevens*, 130 S. Ct. at 1585.

This test would not prevent prosecutions like those in *Schaefer* and *Pierce* since it begins with the presumption that all false statements are outside the First Amendment's protection. Gov't Br. 19-21, 35. Judge Bybee's dissent below sought to minimize the censorial impact of this approach by recognizing "certain limited exceptions" and "exceptions-to-exceptions," *Alvarez*, 617 F.3d at 1222 (Bybee, J., dissenting), but this is no more satisfactory than the statutory exceptions clause discounted in *Stevens*. This Court made clear that serious value cannot be made a "general precondition" to protecting speech that may otherwise fall into an unprotected category. *Stevens*, 130 S. Ct. at 1591.

Thus, the government's First Amendment theory lacks any meaningful limiting principle. The Ninth Circuit majority recognized such an approach "simply invites courts to complete an ever-expanding list" of false speech acts that lack First Amendment protection. *Alvarez*, 638 F.3d at 673. As Chief Judge Kozinski explained, "[e]xceptions to categorical rules, once created, are difficult to cabin; the logic of the new rule, like water, finds its own level, and it's hard to keep it from covering far more than anticipated." *Id.* at 677 (Kozinski, C.J., concurring in denial of rehearing).

The government has no serious response to the prospect that it will seek to create new subsets within "the larger category of false factual statements" whenever it perceives an interest in doing so. Gov't Br. at 28, 35. Indeed, *amici* supporting the government frankly admit that "when lawmakers think that a particular kind of lie is harmful enough, they should generally be free to prohibit it." Professors' Br. at 29. This inevitably would lead to what the Ninth Circuit described as a "Kafkaesque world" in which "the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit." *Alvarez*, 638 F.3d at 686; *id.* at 673 (Kozinski, C.J., concurring).

The government's supporting *amici* do not shrink from promoting what Chief Judge Kozinski dubbed an "ever-truthful utopia," *id.*, as they find no more First Amendment protection for "knowing falsehoods to get sex, friendship, votes, information, or even respect and attention" than for fraud. Professors' Br. at 20. But they argue the First Amendment is safe because "the political process can generally be trusted to prevent the imposition of criminal liability for casual social lies." *Id.* at 29. This overlooks that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Stevens*, 130 S. Ct. at 1591. The state cannot be trusted with broad power to restrict speech based on nothing more than the promise "to use it responsibly." *Id.*

The danger is not limited to the various "white lies, exaggerations, and deceptions" contained in Chief Judge Kozinski's seemingly whimsical examples. Making false speech presumptively unprotected places the burden on speakers to establish that their speech "matters" enough to qualify for "breathing space" protections. Such a constitutional regime undermines First Amendment protection for "wide areas of public discourse." *Alvarez*, 638 F.3d at 674 (Kozinski, C.J., concurring).

This concern is not theoretical. Minnesota adopted a "Fair Campaign Practices Act" that prohibits paid political advocacy about ballot issues "that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false." Minn. Stat. § 211B.06, subd. 1 (2008). The Eighth Circuit held that strict scrutiny applies, expressly following the reasoning of the Ninth Circuit in this case. *281 Care Comm. v. Arneson*, 638 F.3d 621, 634-36 (8th Cir. 2011), *petition for cert. pending*, No. 11-535 (filed Oct. 25, 2011). But Minnesota is seeking review by this Court, and it is not the only state to adopt such a law.[8] *Amici* supporting the government even argue the First Amendment should not prohibit laws

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[8] Some such laws have been upheld, others struck down. *See, e.g., Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991); *State v. Davis*, 499 N.E.2d 1255 (Ohio Ct. App. 1985) (upholding criminal sanctions for knowingly false statements in political campaigns). *But see State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 695 (Wash. 1998) (law violates First Amendment because it "presupposes the State possesses an independent right to determine truth and falsity in political debate").

against lying to get votes, Professors' Br. at 20, 26, and no doubt many more such laws would be enacted if this Court were to agree.

The possibility that politicians could be prosecuted for lying to voters conjures images of non-stop court sessions and overcrowded jails. But while the current level of political discourse is not always easy to defend, it is quite clear that allowing the government to police "truth" would be far worse.

The Solicitor General's attempt to distinguish regulation of political or historical "truth" from restrictions on false "factual" statements, Gov't Br. 53-54, fails to set forth a reliable test for distinguishing between them and simply ignores our history. The falsehoods at issue in cases like *Schaefer*, *New York Times*, and the state campaign cases are not statements of "false doctrine;" they typically involve nothing more than mundane facts that become weapons in the hands of the government when it is constitutionally empowered to punish "falsity."

For that reason, the First Amendment constrains "the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false, as well as what is right and wrong." *Arneson*, 638 F.3d at 636 (quoting Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 3 (2008)). Accordingly, this Court should reject the government's attempt to rewrite First Amendment doctrine.

II. THE STOLEN VALOR ACT'S PROHIBITION OF PURE SPEECH IS NOT NEEDED TO PROTECT MILITARY HONOR AND IT SIGNIFICANTLY UNDERMINES FIRST AMENDMENT DOCTRINE

A. The Act Fails to Account for the Marketplace of Ideas

The government's defense of Section 704(b) of the Stolen Valor Act erroneously assumes it is necessary to enact a federal law and fundamentally alter constitutional interpretation in order to safeguard the esteem in which this nation holds military heroes. This is wrong both because it presumes the impact of false claims of heroism and because it fails to take into account the responses such claims engender.

Although the government argues it is "common sense" to believe those who lie about having won medals will "tend" to undermine military morale and public gratitude, Gov't Br. at 54, the Ninth Circuit was correct to doubt that the reputation and meaning of medals is adversely affected by such tall tales. *Alvarez*, 617 F.3d at 1227. Justice Oliver Wendell Holmes believed "poor and puny anonymities" who published "silly leaflet[s]" should not be prosecuted under the Espionage Act, in part, because "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 628-30 (1919) (Holmes, J., dissenting). This reasoning applies here in spades.

The "marketplace of ideas" theory presumes the value of free expression is not confined to any single statement of fact or opinion. Rather, it is determined by the process in which thoughts and claims are expressed, disputed, and either rejected or accepted. When a false statement is made in this process, it is not the occasion to call in the referee to rule on whether the statement is "in" or "out." As Justice Brandeis wrote, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. at 377 (Brandeis, J., concurring).

The court below recognized this principle when it noted that, unlike defamatory statements – which are uniquely difficult to correct – "when someone falsely claims to have been awarded a Congressionally-authorized medal, and his or her false claims are exposed as self-aggrandizing lies, scandal results, and counter-speech can vindicate the truth in a way the law presumes rebuttal of defamatory falsehoods cannot." *Alvarez*, 617 F.3d at 1211. Indeed, "[t]he social approbation that attends those who would attempt to bask in the reflected glory of honors they have not earned" shows how "the people of this nation continue to revere our brave military men and women regardless of – or perhaps even more so because of – false and vainglorious attempts to appropriate such accolades." *Strandlof*, 746 F. Supp. 2d at 1191.

The Ninth Circuit correctly concluded that "[w]hen valueless false speech, even proscribable

speech, can best be checked with *more* speech, a law criminalizing the speech is inconsistent with the principles underlying the First Amendment." *Alvarez*, 617 F.3d at 1211. And, specifically with respect to the facts at issue here, it found that "Alvarez's lie, deliberate and despicable as it may have been, did not escape notice and correction in the marketplace." *Id.* at 1216.

B. More Speech Effectively Remedies Stolen Valor

Xavier Alvarez could be the poster child for the power of more speech. As the court below noted, "Alvarez was perceived as a phony even before the FBI began investigating him, and he has since been publicly humiliated in his community and in the press (one online article described him as an 'idiot,' and another post described him as a 'jerk')." *Id.* at 1211. This was just the beginning. Alvarez, formerly an obscure local official, was exposed worldwide as a liar. He found himself on the front page of numerous newspapers and had to dodge a "Nightline" camera crew seeking comment. David Allen, *Pomona shocker: Meeting ends in one hour*, INLAND VALLEY DAILY BULLETIN, Oct. 6, 2009, at 2, *available at* 2009 WLNR 19709506.

Alvarez's fellow water board commissioners denounced him as a "disgrace." Will Bigham, *Water District Rep Requests Alvarez Resign in Wake of False Medal Claim*, SAN BERNARDINO COUNTY SUN, May 21, 2008, at 1, *available at* 2008 WLNR 10055631. They "read from a lengthy list of Alvarez's lies and urged Alvarez to have the 'decency to resign [his] position.'" Approximately forty to fifty

veterans appeared before the commission seeking a public apology from Alvarez. Presumably due in part to this scrutiny, Alvarez was later investigated for misappropriating public funds and was sentenced to five years in state prison. *See People v. Alvarez*, 2010 WL 3964595 (Cal. Ct. App. Oct. 12, 2010) (unpublished).

His story is far from unique. Those who claim honors they have not earned cannot escape the public opprobrium that comes with exposure. For some, the shame of deceit has led their obituaries despite otherwise distinguished careers. For example, the obituary for one Illinois Judge and Navy veteran noted, in its second sentence, that he "resigned from the bench in 1995 rather than face possible criminal charges stemming from his acknowledged lie about having won the Medal of Honor."[9] And reports of the 1996 suicide of the Navy's highest ranking officer prominently referred to NEWSWEEK's investigation into whether "he wore two Vietnam War combat decorations that he had not earned."[10]

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[9] *See Memorial planned for former judge*, CHI. TRIB., Apr. 9, 2005, at 13, *available at* 2005 WLNR 23385102.

[10] Philip Shenon, *His Medals Questioned. Top Admiral Kills Himself*, N.Y. TIMES, May 17, 1996, *available at* 1996 WLNR 4362916. Even after his death, it was not clear whether Adm. Jeremy M. Boorda was authorized to wear the combat decorations at issue. *See* Steven Lee Myers, *Admiral, a Suicide, Wins Some Vindication on Combat Awards*, N.Y. TIMES, June 25, 1998, *available at* 1998 WLNR 2970637. This example undermines the claim that it is impossible to innocently but falsely claim to have been awarded a decoration.

Organized efforts of the press and private citizens routinely bring such cases to light. Outraged veterans and others have become "fraud hunters" on a mission to expose false claims of heroism.[11] The numerous news articles cited in the government's brief asserting a "'surge' in false claims" merely confirm the effectiveness of veterans groups and the press at exposing phonies like Alvarez. *See* Gov't Br. at 44 n.10.

As several of the government's *amici* have noted, a 2008 CHICAGO TRIBUNE investigation "used military records to unearth 84 bogus Medals of Honor, 119 Distinguished Service Crosses, 99 Navy Crosses, five Air Force Crosses and 96 Silver Stars" listed in biographies in the reference book WHO'S WHO. *See* John Crewdson, *False Courage: Claims for top military honors don't hold up*, CHI. TRIB., Oct. 26, 2008, *available at* 2008 WLNR 20423903. The article also noted the Pentagon has resisted Congressional efforts to create a national online

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[11] *See, e.g.*, Pam Belluck, *On a Sworn Mission Seeking Pretenders to Military Heroism*, N.Y. TIMES, Aug. 10, 2001, at A1, *available at* 2001 WLNR 3382421 ("Most fraud hunters are veterans motivated by outrage. Operating mostly through Web sites and on their own dime, they scrutinize claims in small-town newspaper articles and in membership rosters of veterans groups."); Editorial, *Making a Sham of Military Honors*, VIRGINIA-PILOT AND LEDGER-STAR, Aug. 9, 2004, *available at* 2004 WLNR 3452826; Tom Farmer, *Dishonorable Decoration: Marine's Unearned Medal Exposed*, BOS. HERALD, Feb. 10, 2004, *available at* 2004 WLNR 401638; *Man Held in Cole County on Old Warrant Charged for Wearing Fake Medal of Honor*, JEFFERSON CITY NEWS-TRIB., July 12, 2002, *available at* 2002 WLNR 15346628.

database naming all who have earned medals for valor, citing cost and other concerns. *Id.*

Efforts to ferret out false claims have been made even more effective in recent years by the creation of non-governmental online databases. One such website founded by a Vietnam veteran, stolenvalor.com, is dedicated to exposing imposters.[12] Veterans groups similarly ensure that frauds are never forgotten through websites like ReportStolenValor.org. This site, operated by AMVETS, is designed to "help facilitate the reporting of suspected Stolen Valor offenders to federal authorities and the news media."

The press has a particularly important role to play in this area. Gannett's MILITARY TIMES newspapers operate the Hall of Valor, a database with details on tens of thousands of medal recipients. *See* http://militarytimes.com/citations-medals-awards/. They also maintain the Hall of Stolen Valor, a site dedicated to unmasking imposters. *See* http://militarytimes.com/projects/hallofstolenvalor. Through these efforts, the names of 24 fake Medal of Honor recipients were scrubbed from the Library of Congress-funded Veterans History Project following an investigation by MILITARY TIMES. Mike Stuckey, *Error, fraud mar vets' oral histories, critics say*;

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[12] Even before Congress adopted Section 704(b), the founder of the site teamed with an investigative journalist to expose the problem of false claims of military decorations. *See* B.G. Burkett & Glenna Whitley, *Stolen Valor: How the Vietnam Generation Was Robbed of Its Heroes and Its History* (1998).

available at www.msnbc.msn.com/id/20853588/ns/us_news-military/.

The press also has exposed false claims about military valor made by the government. A recent investigation by McClatchy Newspapers, for example, found accounts of the exploits of a recent Medal of Honor recipient issued by the Marine Corps and the White House were "untrue, unsubstantiated or exaggerated." *See* Jonathan S. Landay, *Marines Promoted Inflated Story for Medal of Honor Recipient*, WASH. POST, Dec. 15, 2011, at A1, *available at* 2011 WLNR 25813809. The award came at a time when "senior Marine Corps officials conceded the pressure to award more medals, and to do it quickly." *Id.* Similarly, the press uncovered false official accounts of battlefield heroics in the cases of Pat Tillman and Jessica Lynch.[13] These instances reinforce both the power of a free press in the marketplace of ideas and the critical importance

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[13] *See, e.g.*, Scott Lindlaw & Martha Mendoza, *General's memo voiced doubts in Tillman's death*, Associated Press, Aug. 4, 2007, *available at* 2007 WLNR 14988150 (press FOIA requests revealed that "Lt. Gen. Stanley McChrystal acknowledged that he had suspected several days before approving the Silver Star citation on April 28, 2004, that Pat Tillman may have died by fratricide" rather than "devastating enemy fire" as noted in the citation); David D. Kirkpatrick, *After the War: the Rescue: Reports on Soldier's Capture Are Partly Discounted by Paper*, N.Y. TIMES, June 18, 2003, at A14, *available at* 2003 WLNR 5235265 (noting news reports "cast doubt on several aspects of the initial portrayals of her story, raising questions about whether the United States military manipulated the episode for propaganda purposes and about whether American news organizations were seduced by a gripping, patriotic tale").

of not empowering the government to be the arbiter of truth.

These collective responses are a better measure of the social impact of false assertions of military heroics than are the lies themselves. There is no basis for the government's assertion that, "[i]n the aggregate, false claims make the public skeptical of all claims to have received awards, and they inhibit the government's efforts to ensure that the armed services and the public perceive awards as going to only the most deserving few." Gov't Br. at 14. Quite to the contrary, the sharp reaction to false claims in the marketplace of ideas honors our heroes by discrediting the undeserving and refocusing acclaim where it belongs – on those who honestly earned their medals.

The honor symbolized by military decorations is not preserved by imprisoning those who lie about having won them, but by shining a light on their deceit. This Court made the same point about flag desecration in *Texas v. Johnson* finding that "[t]he way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." 491 U.S. at 419.

C. Public Policy Should Support the Marketplace of Ideas, Not Undermine It

To affirm the Ninth Circuit's holding that Section 704(b) is unconstitutional does not suggest there is no role for public policy in this area. As the court below noted, "[p]reserving the value of military decorations is unquestionably an appropriate and

worthy governmental objective that Congress may achieve through, for example, publicizing the names of legitimate recipients or false claimants, [or] creating educational programs...." *Alvarez*, 617 F.3d at 1210. Congress could create grants to support such efforts, or it could fund similar government efforts to recognize legitimate medal winners and expose the fakes. Such measures would support and enhance marketplace efforts by the press and others without distorting First Amendment doctrine.

There also is an appropriate role for law enforcement within existing constitutional bounds. In many cases, false claims of military honors are part of a fraudulent scheme and may be prosecuted without need to alter or expand First Amendment exceptions.[14] Recognizing that fact, the Ninth Circuit suggested "Congress could revisit the Act to modify it into a properly tailored fraud statute." *Alvarez*, 617 F.3d at 1212. One pending proposal to amend the Stolen Valor Act seeks to do just that.[15]

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[14] *See, e.g., United States v. Perelman*, 658 F.3d 1134, 1135 (9th Cir. 2011) (defendant prosecuted for wearing Purple Heart he did not earn was also convicted of defrauding Veterans Administration of $180,000 in disability benefits); *United States v. Swisher*, 790 F. Supp. 2d 1219 (D. Idaho 2011) (defendant in Stolen Valor Act case also convicted of defrauding Veterans Administration); *Strandlof*, 746 F. Supp. 2d at 1188 (sponsors of Stolen Valor Act "were concerned that false claims regarding military awards would perpetuate fraud") (citing legislative history).

[15] The Stolen Valor Act of 2011, H.R. 1775 and S.1728. 112th Cong., would not prohibit all lying about medals, but would apply to anyone who "knowingly makes a

Such an approach would serve the interest of preventing the false claims about military honors as a vehicle for fraud. It could do so without requiring this Court to rewrite First Amendment doctrine by recognizing a broad new category of unprotected speech, followed by years of litigation to craft "exceptions to the exception." Military honor would best be preserved by measures that respect current constitutional limits and rely on the marketplace of ideas.

CONCLUSION

Our nation cannot honor the achievements of military heroes by constricting the freedoms for which they fought. For the same reason, in striking down a state law prohibiting flag desecration, this Court explained that "[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents." *Johnson*, 491 U.S. at 420. In the context presented here, those who pretend to be heroes should not be permitted to undo the work of those with real courage. As Zechariah Chafee observed of the Espionage Act cases, "[t]hose who gave their lives for freedom would be the last to thank us for throwing aside so lightly the great traditions" of our constitutional heritage. Chafee, *supra*, at 107.

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misrepresentation regarding his or her military service" only if made "with intent to obtain anything of value."

For the foregoing reasons, this Court should uphold the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

Advance Publications, Inc., directly and through its subsidiaries, publishes 18 magazines with nationwide circulation, daily newspapers in over 20 cities, and weekly business journals in over 40 cities throughout the United States. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Cox Media Group, Inc. is an integrated broadcasting, publishing, direct marketing and digital media company. Its operations include 15 broadcast television stations, a local cable channel, a leading direct marketing company, 85 radio stations, eight daily newspapers and more than a dozen non-daily print publications, and more than 100 digital services.

Daily News, L.P., publishes the New York Daily News, the fourth largest newspaper in the country.

Dow Jones & Company, Inc. is the publisher of *The Wall Street Journal*, a daily newspaper with a national circulation of over two million, *WSJ.com*, a news website with more than one million paid subscribers, *Barron's*, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides realtime financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, and local news and information web sites. The company's portfolio of locally focused media properties includes: 19 TV stations (10 ABC affiliates, three NBC affiliates, one independent and five Azteca Spanish language stations); daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps

Media Center, home of the Scripps Howard News Service.

Gannett Co., Inc. is an international news and information company that publishes 82 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. In broadcasting, the company operates 23 television stations in the U.S. with a market reach of more than 21 million households. Each of Gannett's daily newspapers and TV stations operates Internet sites offering news and advertising that is customized for the market served and integrated with its publishing or broadcasting operations.

Magazine Publishers of America is a national trade association including in its present membership more than 240 domestic magazine publishers that publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the Sacramento Bee, the Miami Herald, the Kansas City Star and the Charlotte Observer. The newspapers have a

combined average circulation of approximately 2.2 million daily and 2.8 million Sunday.

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as an *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

The National Press Club is a membership organization dedicated to promoting excellence in journalism and protecting the First Amendment guarantees of freedom of speech and of press. Founded in 1908, it is the nation's largest journalism association.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to photojournalism.

The New York Times Company is a leading global multimedia media news and information company, which publishes The New York Times, the

International Herald Tribune, and The Boston Globe and operates NYTimes.com, BostonGlobe.com, Boston.com, About.com and related properties.

The Newspaper Guild - CWA is a labor organization that promotes and represents the interests of approximately 30,000 employees within newspapers, news magazines, new media web sites, news services and other media. The Guild's membership, particularly journalists, have a professional interest in government efforts to regulate speech.

NPR, Inc. is an award winning producer and distributor of noncommercial news programming. A privately supported, not for profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 268 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

The Online News Association ("ONA") is the premier U.S.-based organization of online journalists. ONA's members include reporters, news writers, editors, producers, designers, photographers and others who produce news for distribution over the Internet and through other digital media, as well as academics. ONA is dedicated to advancing the interests of online journalists and the public,

generally, by encouraging editorial integrity, editorial independence, journalistic excellence, freedom of expression and freedom of access.

ProPublica is an independent, non-profit newsroom that produces investigative journalism in the public interest. In 2010, it was the first online news organization to win a Pulitzer Prize. In 2011, ProPublica won the first Pulitzer awarded to a body of work that did not appear in print. ProPublica is supported primarily by philanthropy and provides the articles it produces, free of charge, both through its own website and to leading news organizations selected with an eye toward maximizing the impact of each article.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the publishing side, Tribune publishes eight daily newspapers – Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Virginia), The Morning Call (Allentown, Pa.), and South Florida Sun-Sentinel. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. Tribune Company is a privately held company.

The Washington Post publishes a daily and Sunday newspaper with the nation's fifth-largest print circulation, as well as a website (washingtonpost.com) that attracts more than 17 million unique visitors per month.

WNET is the parent company of THIRTEEN, WLIW21, Interactive Engagement Group and

Creative News Group and the producer of approximately one-third of all prime time programming seen on PBS nationwide. Locally, WNET serves the entire New York City metro area with unique on-air and online productions and innovative educational and cultural projects. Approximately five million viewers tune in to THIRTEEN and WLIW21 each month.

AMICUS CURIAE BRIEF

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INTEREST OF AMICI CURIAE

The States have a substantial and often compelling interest in punishing knowingly false statements of fact. States enact such laws to prevent, among other things, false impersonation, kidnapping, bomb-threat hoaxes, and false claims of military honors. The Ninth Circuit's decision unjustifiably calls this legal tradition into question.

States also organize and maintain the National Guard, 32 U.S.C. § 109, so they share the federal government's compelling interest in fostering troop morale. The Ninth Circuit's decision gives no deference to military leaders' conclusion that laws against stolen valor are vital to preserving morale,

and thereby threatens military preparedness in a time of war.

Seeking to preserve their ability to regulate knowingly false statements of fact, and supporting the United States military's efforts to bestow honor on its heroes, the amici States respectfully submit this brief in support of petitioner United States of America.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROTECT KNOWINGLY FALSE STATEMENTS OF FACT ABOUT A SPEAKER'S OWN CREDENTIALS.

States have a long tradition of punishing impostors who lie about their credentials. For example, States have laws substantively identical to the Stolen Valor Act, prohibiting knowingly false statements about military decorations. See, *e.g.*, CONN. GEN. STAT. § 53-378(b); 720 ILL. COMP. STAT. 5/17-2(e)(1); MO. STAT. § 578.510(3); TENN. CODE § 58-1-118; UTAH CODE § 76-9-706(2). States have many other prohibitions on knowingly false statements of fact, including laws punishing speakers who falsely claim to be members of a veteran's organization, KAN. STAT. ANN. § 21-6410; the parents of a child, 720 ILL. COMP. STAT. 5/17-2(b)(7); or public officials, IOWA CODE § 718. These laws punish speech, even in the absence of harm or intent to mislead. Indeed, contrary to the Ninth Circuit's assertion, many impersonation statutes target false speech without regard to "conduct performed in order to obtain, at a cost to another, a benefit to which one is not entitled." Pet. App. 28a. Examples of state laws against knowingly false

statements of fact, including such impersonation statutes, are set out in the margin.[1]

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[1] See, *e.g.*, 11 DEL. CODE § 907(3) ("A person is guilty of criminal impersonation when the person . . . pretends to be a public servant."); 720 ILL. COMP. STAT. 5/17-2(a) (impersonating a member of a veterans' organization); 720 ILL. COMP. STAT. 5/17-2(b)(2) (impersonating a public employee, public official, or employee of the federal government); 720 ILL. COMP. STAT. 5/17-2(b)(8), (11) (impersonating a firefighter or emergency management worker); IOWA CODE § 718 ("Any person who falsely claims to be . . . an elected or appointed officer, magistrate, peace officer, or person authorized to act on behalf of the state or any subdivision thereof . . . commits an aggravated misdemeanor."); KAN. STAT. ANN. § 21-5917(a) (imposing criminal liability for "representing oneself to be a public officer, public employee or a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas, with knowledge that such representation is false"); N.D. CENT. CODE § 12.1-13-04 ("A person is guilty of an offense if he falsely pretends to be . . . a law enforcement officer."); N.D. CENT. CODE § 20.1-01-24 ("No person may falsely claim the authority of or impersonate a game warden."); NEV. REV. STAT. § 197.120 ("Every person who shall falsely personate or represent any public officer . . . shall be guilty of a gross misdemeanor."); 59 OKLA. STAT. ANN. § 2069 ("It is a misdemeanor for any person to . . . [i]mpersonate in any manner or pretend to be a perfusionist."); REV. CODE WASH. § 19.94.500 (making it a crime to "impersonate in any manner" a weights and measures official); TENN. CODE § 68-140-515 ("It is a Class C misdemeanor for any person to . . . [i]mpersonate . . . an emergency medical services provider."); TEX. PENAL CODE § 37.12(d) ("A person commits an offense if the person intentionally or knowingly misrepresents an object as property belonging to a law enforcement agency."); VA. CODE § 3.2-5644 (making it a crime to "impersonate in any way" a weights and (continued...)

These laws against imposture are consistent with First Amendment principles. As petitioner explains, Br. at 18-20, false statements of fact have "no constitutional value," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and so they receive no constitutional protection unless necessary to provide adequate "breathing space" for fully protected speech, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964).

Punishing speakers who lie about their credentials does not deter truthful or otherwise

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measures official); VA. CODE § 47.1-29 ("Any person who shall willfully act as, or otherwise impersonate, a notary public while not lawfully commissioned as a notary public or other official authorized to perform notarial acts, shall be guilty of a Class 6 felony."); 9 VT. CODE ANN. § 2763 (punishing "[a]ny person who impersonates in any way" a weights and measures official); 13 VT. CODE ANN. § 3002 (punishing "[a]ny person who impersonates . . . a sheriff, deputy sheriff, constable, police officer, fish and game warden, or any other state, county or town officer"); WIS. STAT. § 29-945 (punishing "[a]ny person who falsely represents himself or herself to be a [game] warden"); WY. STAT. § 33-43-118(a)(iv) (making it a crime to "[i]mpersonate in any manner . . . a respiratory care practitioner"); see also FLA. STAT. ANN. § 817.567(1) ("No person in the state may claim, either orally or in writing, to possess an academic degree . . . unless the person has, in fact, been awarded said degree."), repealed May 5, 2011, by Laws 2011, c. 2011-37; cf. CAL. PENAL CODE § 148.1(c) ("Any person who maliciously informs any other person that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the information is false, is guilty of a crime."); MINN. STAT. ANN. § 609.505(2) (making it a crime to knowingly file a false report of police misconduct).

protected speech. Laws against imposture involve facts that are objectively verifiable, so there is no risk that a speaker might be punished for expressing an opinion. Whether a person actually received the Medal of Honor is not open to debate. Nor is it debatable whether a person is a perfusionist, 59 OK. STAT. ANN. § 2069, or a game warden, N.D. CENT. CODE § 20.1-01-24, or a United States citizen, 18 U.S.C. § 911 ("Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned."); see also *United States* v. *Franklin*, 188 F.2d 182, 186 (7th Cir. 1951) ("A fraudulent purpose in making a false claim of citizenship is not essential to offense under [18 U.S.C. § 911].").

Moreover, laws against imposture involve facts that are plainly knowable to the speaker, so there is no risk that a speaker might be punished for an honest mistake. Every person of sound mind knows whether they possess the significant credentials that are the subject of laws against imposture. See *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) ("The truth of commercial speech . . . may be more easily verifiable by its disseminator . . . . [O]rdinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.").

The Court has observed, to be sure, that "even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New*

York Times, 376 U.S. at 279 n.20 (quoting JOHN STUART MILL, ON LIBERTY 15 (R.B. McCallum ed., Basil Blackwell (1947)) (1859)). Indeed, it is easy to see the value in false statements of historical or scientific fact: We can be more certain of the truth when people have the freedom to contest it. See MILL, ON LIBERTY, *supra*, at 18 ("Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action.").

Speakers' lies about their own credentials, however, do not contribute to the public debate. They are objective facts that we can know for certain, not the sort of empirical questions that benefit from a robust exchange of ideas. Thus, we can be assured that the *prosecutor's* certainty is the same thing as *absolute* certainty. Lies about unearned credentials serve only to cloak the speaker in unwarranted credibility, and frustrate the pursuit of truth.

II. FALSE STATEMENTS ABOUT UNEARNED MILITARY DECORATIONS CAUSE SUBSTANTIAL HARM TO THE MILITARY AND ITS VETERANS BY BLURRING THE SIGNALING FUNCTION OF THOSE AWARDS.

A. Impostors who violate the Stolen Valor Act cause substantial harm to the United States military and to recipients of military honors. Military decorations such as the Purple Heart and the Medal of Honor serve an important signaling function in civil society. It is widely understood that these decorations recognize "acts of valor, heroism, and exceptional duty and achievement." *Examination of Criteria for Awards and Decorations: Hearing Before the Military Personnel Subcomm. of the House*

Comm. on Armed Services, 109th Cong., 2d Sess. 24 (2006) (statement of Lt. Gen. Roger A. Brady). That these awards are rare and exclusive makes their signaling function all the more powerful.

When military impostors proliferate unchecked, they diminish the value of military honors by blurring their signaling function. This blurring effect causes substantial harm to the military and to the recipients of military honors. Courts and economists in the field of trademark law investigate this type of harm, and their account of the damage that imposters inflict on genuine articles is directly relevant to the compelling interests that animate the Stolen Valor Act.

B. Trademark law punishes sellers of knockoff goods, even when the purchaser knows the goods are fake. Lanham Trademark Act, Pub. L. No. 87-772, § 17, 76 Stat. 769, 773-74 (1962) (codified as amended at 15 U.S.C. § 1114). Trademarks owners, as well as consumers who bought the real thing, are harmed when an impostor unjustly acquires the prestige of a luxury trademark without paying the high price. See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 308 (1987) ("If others can buy and wear cheap copies, the signal given out by the purchasers of the originals is blurred."); *Hermes Int'l* v. *Lederer De Paris Fifth Ave., Inc.*, 219 F.3d 104, 109 (2d Cir. 2000) ("[A] loss occurs when a sophisticated buyer purchases a knockoff and passes it off to the public as the genuine article, thereby confusing the viewing public and achieving the status of owning the genuine article at a knockoff price."). Judge Jerome Frank led the way in recognizing the harm that

results from "post-sale confusion," as the doctrine is now known:

> [P]laintiff copied the design of the Atmos clock because plaintiff intended to, and did, attract purchasers who wanted a 'luxury design' clock. This goes to show at least that some customers would buy plaintiff's cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article. Plaintiff's wrong thus consisted of the fact that such a visitor would be likely to assume that the clock was an Atmos clock.

Mastercrafters Clock & Radio Co. v. *Vacheron & Constatin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955). Since that decision, courts have used trademark law to penalize sellers of knockoff goods, preserving the exclusivity of certain trademarks, along with their value to both trademark owners and consumers. See, *e.g.*, *Rolex Watch U.S.A., Inc.* v. *Canner*, 645 F. Supp. 484, 492 (S.D. Fla. 1986) ("[People] who see the watches bearing the Rolex trademarks on so many wrists might find themselves discouraged from acquiring a genuine because the items have become too common place and no longer possess the prestige once associated with them."); *Ferrari S.P.A. Esercizio Fabriche Automobili E Corse* v. *Roberts*, 994 F.2d 1235, 1245 (6th Cir. 1991) (observing that much of Ferrari's value lies in the brand's rarity, which would be destroyed "[i]f the country is populated with hundreds, if not thousands, of replicas of rare, distinct, and unique vintage cars"). These decisions

recognize that the rarity of a luxury good is a critical characteristic of the good itself, and that its value (to both trademark owner and purchaser) is substantially diminished by impostors.

C. Battlefield heroism is certainly not motivated by the desire for ribbons and medals, but military decorations are economically similar to luxury goods in many important respects. The United States military uses these exclusive decorations to confer prestige upon its heroes. Those who receive military decorations have paid a considerable price, and the military has a compelling interest in assuring that impostors cannot unjustly obtain prestige without doing the same. The existence of impostors substantially harms the military by undermining this prestige-conferring function of its decorations.

Impostors also harm the recipients of military honors, both present and future, by giving the public reason to doubt their genuine claims of heroism and sacrifice. In terms of trademark law, once the market is swamped with knockoff Rolex watches, the public will come to suspect that everyone is wearing a fake. Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 976 (1993) ("Rolex's swank image is based on exclusivity, not popularity, and the proliferation of Rolex look-alikes cuts away at that valuable commodity."). The Ninth Circuit gets that concept exactly backwards when it suggests that the increasing number of impostors is evidence that the reputation of military honors remains intact. Pet. App. 23a.

The very existence of the Stolen Valor Act instills confidence in the public that a military hero's story is true. The Ninth Circuit, however, suggests

that the solution to impostors is public exposure through "more speech." Pet. App. 39a. The court's proposal will prove inadequate because of the nature of the harm that the Stolen Valor Act seeks to redress. If the nation relies on the press to expose impostors, those frequent and public revelations will cause the public to overestimate the percentage of fake heroes in their midst. See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163-64 (Daniel Kahneman et al. eds., 1982).

As a result, the Ninth Circuit's proposal of "more speech" would only exacerbate the harm of military impostors. Public exposure of impostors, without any attendant criminal conviction, would cause the public to place less stock in the stories of heroism and excellence that military honors signify. Military honors would be worth less to recipients because the public would be more likely to perceive them as frauds, rather than heroes. See Kozinski, *supra*, at 976 ("[I]f everyone knows you can pick up the same product or an exact replica dirt cheap, how can ownership of the product help telegraph the idea that you're the kind of swell guy who has money to burn?"); see also *id.* ("Keeping the supply low and the price high is thus part and parcel of the good itself.").

In lightly dismissing the harm caused by military impostors, Pet. App. 23a, the Ninth Circuit committed a serious blunder. If military decorations confer exclusive prestige on the wearers, and surely they do, then Congress was correct to find that impostors substantially diminish the value of those awards. Congress made the identical finding in the

trademark context, 15 U.S.C. § 1114, and that finding of harm is supported by the actions of trademark owners, who have used the Lanham Act to pursue infringers in the courts. The Ninth Circuit does nothing to explain why the United States military is not entitled to the same solicitude as the makers of Rolex and Ferrari. See Kozinski, *supra*, at 976 (concluding that "a communicative aspect may be served by wearing a fake Rolex watch" but that "the message is false and should be given relatively little weight" and therefore "is surely outweighed" by the interests of trademark owners and consumers).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-210

In the
Supreme Court of the United States

UNITED STATES OF AMERICA, Petitioner,
v.

XAVIER ALVAREZ, Respondent.

ON THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

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STATEMENTS OF INTEREST OF *AMICUS CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

It is a hallmark of First Amendment law that expression is presumptively protected unless it falls within one of several carefully prescribed exceptions. *Brown v. Entertainment Merchants Association*, 564 U.S. ____, 131 S.Ct. 2729, 2733 (2011). While this Court has stated that there may be some historically unprotected categories of speech that have yet to be "identified or discussed" in its case law, the Government cannot establish an exception to First Amendment protection "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Id.* at 2734 (internal citations omitted). The Ninth Circuit Court of Appeals correctly concluded that false speech which may affect the reputation of the military, but which does not directly interfere with

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[1] This *amicus curiae* brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of Court for the Supreme Court of the United States.

military efforts relating to the nation's safety, does not fall into one of these exceptions. *United States v. Alvarez*, 617 F.3d 1198, 2000 (9th Cir. 2010) (noting that "[a]ll previous circumstances in which lies have been found proscribable involve not just knowing falsity, but additional elements that serve to narrow what speech may be punished").

Although this case raises a number of First Amendment issues, the Thomas Jefferson Center for the Protection of Free Expression believes it could best assist this Court by focusing this amicus curiae brief on the topic of whether the speech restricted by the Stolen Valor Act has a tradition of proscription in American history. Such a review reveals a lack of historical precedent for restricting false speech about military decorations. As such, and because the Act fails to meet the strict scrutiny test that is therefore required, the opinion of the Ninth Circuit Court of Appeals should be affirmed.

ARGUMENT

I. THE STOLEN VALOR ACT CREATES AN UNPROTECTED CATEGORY OF SPEECH NOT PREVIOUSLY RECOGNIZED IN THIS COURT'S FIRST AMENDMENT DECISIONS.

"[A]s a general matter . . . Government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (internal quotation marks omitted). Permissible content-based speech restrictions have traditionally been limited to a small and circumscribed number of categories. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").[2] This Court has said, "[W]e cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that Governmental bodies may not

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[2] Traditional categories of unprotected speech include obscenity (*Miller v. California*, 413 U.S. 15 (1973)), defamation (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), commercial fraud (*Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)), incitement (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), "true threats" of violence (*Watts v. United States*, 394 U. S. 705, 708 (1969)), and child pornography (*New York v. Ferber*, 458 U.S. 747 (1982)).

prescribe the form or content of individual expression." *Cohen v. California*, 403 U.S. 15, 24 (1971). Non-defamatory, non-fraudulent false statements of fact have never been included in any historically unprotected class, and a categorical First Amendment exception for the prohibition of non-commercial misrepresentation to the public has never been created.

A. The statute does not regulate fraudulent or defamatory speech.

Although defamatory and fraudulent speech have a tradition of proscription, the Supreme Court has never held that mere "false speech" is categorically unprotected under the First Amendment. Indeed, this Court has recognized the need "to insulate even *demonstrably* false speech from liability" in order to insure First Amendment freedoms. *See Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 778 (1986).

To the extent that the Court has held that false speech is constitutionally unprotected—as in fraud and defamation—such speech has featured concrete harm to a specific party. The Stolen Valor Act does not work to remedy any similar harm. Fraud statutes protect contracting parties from detrimental and material reliance on false statements. Defamation laws provide restitution when a party suffers reputational loss resulting from false statements. In both cases, the relief remedies concrete injuries. When there is no particularized injury to a specific person—as in the group libel context—no cause of action arises. *See, e.g., Fowler v. Curtis Publishing Co.*, 182 F.2d 377 (D.C. Cir.

1950) (agreeing with the district court opinion that "in case of a defamatory publication directed against a class, without in any way identifying any specific individual, no individual member of the group has any redress").

No comparable individualized harms exist here. The Government's assertion that the Stolen Valor Act protects military recruiting efforts and soldier morale is highly speculative at best. There is little to support the conclusions that recruitment efforts or military morale have been detrimentally affected by a few individuals making false claims about military honors, much less to warrant the subjugation of First Amendment rights.

B. The historical tradition of stringent restrictions on the speech of military personnel does not encompass false statements about military service made by civilians.

While this Court has on occasion sustained provisions regulating speech on military bases and the speech of military personnel,[3] the justifications for those restrictions are found in the unique interests of the military and do not apply in the context of the civilians making false claims about military honors. In *Parker v. Levy*, this Court upheld

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[3] For example, Article 117 of the "Manual of Courts-Martial" identifies as an actionable offense, using "provoking or reproachful words or gestures towards any other person" – speech that would be clearly protected under the First Amendment in a civilian setting. Art. 117(a), Uniform Code of Military Justice, 10 U.S.C. § 917.

the court-martial of an army captain who challenged his conviction under the Uniform Code of Military Justice. 417 U.S. 733 (1974). The captain claimed that the prosecution of his public statements "urging Negro enlisted men to refuse to obey orders to go to Vietnam" violated the First Amendment. *Id.* at 733. In rejecting this argument, the Court stated:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id. at 758. The Court continued, quoting the opinion of the U.S. Court of Military Appeals:

> Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities . . . . Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

Id. at 758-59 (citing *United States v. Priest*, 45 C.M.R. 338, 344 (1972)) (internal citations omitted). *See also Brown v. Glines*, 444 U.S. 348 (1980) (upholding punishment for an officer who distributed petitions without permission); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (holding that prohibition on wearing yarmulkes while on duty is allowable).

All of the cases cited above involve circumstances where a current member of the military refused to obey orders. Although the context in which the disobedience arose varied—such as urging disobedience by others, disrupting order with unauthorized petitions, and upsetting the uniformity of appearance—all of these incidents involved individuals who refused to comply with the authority to which they had voluntarily submitted, thereby undermining the effective functioning of the military. *Parker*, 417 U.S. at 759; *Brown*, 444 U.S. at 354; *Goldman*, 475 U.S. at 516. Those prosecuted under the Stolen Valor Act have not made this commitment of obedience. They have not voluntarily submitted to military authority. And they are not in positions to disrupt the current efficacy of the armed forces.

Although the Stolen Valor Act's concern is the reputation of American military forces, it does not relate in any way to the actual functioning and success of the military through the people who are entrusted with that solemn duty. As such, it fails to serve the only state interest that historically has been deemed to outweigh First Amendment

protections in the unique and limited context of matters involving military service.

II. HISTORY REJECTS AN EXCEPTION TO THE FIRST AMENDMENT BASED ON PROTECTING THE REPUTATION OF GOVERNMENT INSTITUTIONS.

Historically, the United States has not maintained broad provisions relating to wearing, manufacturing, or selling military decorations. In determining whether there is a historical basis for accepting the Stolen Valor Act's restrictions on free speech, therefore, it is appropriate to look at other efforts through time to meet the same broad objective—protecting the reputational interest of the Government. Absent a clear tradition of exempting speech from protection because of its potential effect on citizens' respect for the Government, such speech may not be considered an unprotected category that was contemplated with the drafting of the First Amendment but has yet to be addressed by this Court. *See Brown*, 131 S.Ct at 2733. The most closely analogous area of law is seditious libel. Its blemished history in this country indicates that the nation long ago abandoned criminalizing speech for the simple reason that it might discredit Government.

A. Origins of seditious libel laws

The origin of sedition law is found in English common law. The 1606 case *De Libellis Famosis* criminalized seditious libel because it posed the danger of undermining confidence in and respect for

Government, its policies, and officials. *See De Libellis Famosis*, 77 Eng. Rep. 250, 251 (Star Chamber 1606). The doctrine flourished in England where it was frequently utilized by the Crown to suppress unwanted political speech and to prosecute political rivals.

In America, however, seditious libel failed to take root. The colonies initially broke with English common law in the case of John Peter Zenger in 1735. *See generally* Peter Finkelman, A Brief Narrative of the Case and Tryal of John Peter Zenger (1st ed. 1997). Zenger was a publisher who was prosecuted for seditious libel for his criticism of the royal governor of New York. In contrast to the claims of the prosecution, Zenger's attorney argued that a conviction must be based not only on the question of whether Zenger made the statements at issue, but whether they were in fact false. Despite a charge by the judge to do otherwise, the jury acquitted Zenger. *See* Michael Kent Curtis, Free Speech 41-42 (2000).

The decision to acquit Zenger set a foundation for a liberal speech regime. Zenger's case stood for the proposition that statements on matters of public concern, even if critical of Government, were speech of value to the American public.

A second false start to establishing a seditious libel regime occurred with the passage of the Sedition Act of 1798. In an attempt to silence the political speech of its opponents, the Federalist Congress made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government . . . with

intent to defame." Sedition Act, 1 Stat. 596. The Act purported to criminalize political criticism only if it was "false . . . and malicious" and the author intended it to "defame." In practice, however, these statutory requirements proved not to be a substantial obstacle to jailing political opponents. *See* Harry Kalven, Jr., *A Worthy Tradition* 64 (1988). Judges assumed an alleged defamatory statement was false and it was the burden of the defendant to prove otherwise. *See* Anthony Lewis, *Make No Law* 58 (1992).

The Sedition Act caused a public outcry and led to James Madison's authoring of a resolution in the Virginia legislature condemning the Act as "palpable and alarming infractions of the Constitution." *See* Lewis, *supra*, 61. The public outrage against the Act eventually died in 1801 when Congress opted not to renew it. Although its constitutionality was never directly addressed by the Supreme Court, the expiration of the Sedition Act of 1798 reflected Americans' appreciation for the centrality of free speech to democracy. *See* Lewis, *supra*, at 65. Madison's view that the people are sovereign and must be free to engage in speech about the Government and its institutions even when that speech is critical or disrespectful triumphed. *See* Lewis, *supra*, 153-154.

A third attempt to establish a seditious libel exception to First Amendment protection was the 1918 amendments to the Espionage Act of 1917—sometimes referred to as "the Sedition Act of 1918"—which made it a felony to publish "any disloyal . . . or abusive language about the form of government of

the United States" while the county was at war. Espionage Act, 40 Stat. 217, amended by Act of May 16, 1918, 40 Stat. 553. In *United States v. Abrams*, 250 U.S. 616 (1919), the defendants were convicted on four counts under the Espionage Act for printing leaflets critical of the U.S. Government's military intervention in Bolshevik Russia. On appeal, the Supreme Court did not address the constitutionality of the two seditious libel counts and upheld the convictions on the concurrent counts of obstructing the draft and war effort against Germany during World War I. *See Abrams* at 624; *Kalven* at 65.

In the wake of *Abrams*—and Justice Holmes' compelling dissent—Congress repealed the Sedition Act of 1918 at the end of 1920. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 230 (2004) (citing 66th Cong, 3d Sess, in 60 Cong Rec H 293-94 (Dec 13, 1920)).

B. The Court's reflections on seditious libel laws

Despite not directly addressing the constitutionality of a seditious libel regime, *Abrams* did shed some light on its place in the American legal tradition. In his dissent, Justice Holmes voiced the understanding that the adoption of the First Amendment proscribed the common law action of seditious libel and, as a consequence, that the Sedition Act of 1798 was a regrettable deviation for which Congress later repented.

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.[4]

Abrams, 250 U.S. 616 at 630 (Holmes, J., dissenting).

In 1964, the Supreme Court confirmed that seditious libel had no place in American political and legal traditions. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), a libel suit was brought by a public official against several civil rights activists who had criticized the Government's imprisonment of Martin Luther King, Jr., the Court held that it violated the First Amendment to impose liability for defamation of a public official unless the aggrieved party showed that the damaging false statements had been made

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[4] "Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional." *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (citing Act of July 4, 1840, c. 45, 6 Stat. 802; H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840)). "Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: 'I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.'" *Id.* (citing Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.) 555, 556).

with "actual malice." *See id.* at 279-80. The Court's reasoning cut directly to the impermissibility of seditious libel:

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on Government and public officials.

Id. at 270.

The Court then buried seditious libel once and for all: "[N]o court of last resort in this country has ever held, or even suggested, that prosecutions for libel on Government have any place in the American system of jurisprudence." *Id.* at 291. On the contrary, the Court noted several instances in which the unconstitutionality of seditious libel laws had been assume:

> [John] Calhoun, reporting to the Senate on February 4, 1836, assumed that [seditious libel's] invalidity was a matter 'which no one now doubts.' Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. The invalidity of the Act has also been assumed by Justices of this Court. *See* Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616,

> 630; Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 288-289 . . . . These views reflect a broad consensus that the [Sedition] Act, because of the restraint it imposed upon criticism of Government and public officials, was inconsistent with the First Amendment.

Id. at 276.

It is evident that the English common law tradition of seditious libel never firmly established itself in American political and legal traditions because it contradicted the fundamental American understanding of the democratic process. The rejection of seditious libel sweeps away any historical support for Congress to enact legislation designed to protect the reputation of the U.S. military. The Stolen Valor Act is as historically unfounded as it is legally unsound.

III. NEITHER CONGRESS NOR THE COURTS MAY SIMPLY CREATE NEW CATEGORIES OF UNPROTECTED SPEECH BASED ON A BALANCING TEST.

In two recent First Amendment cases, the Government has argued that "lack of historical warrant did not matter; that it could create new categories of unprotected speech by applying a 'simple balancing test' that weighs the value of a

particular category of speech against its social costs and then punishes that category of speech if it fails the test." *Brown* 131 S.Ct. at 2734 (citing *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010)). This Court rejected the Government's argument in both *Brown* and *Stevens*, holding that "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" *Id.*

The Court's opposition to the creation of new categories of unprotected speech applies just as strongly in this case. A new category of unprotected speech may not be created simply by balancing the interests at stake. The speech at issue in the Stolen Valor Act falls outside the scope of traditionally unprotected speech and thus warrants continued First Amendment protection.

IV. BECAUSE A COMPELLING GOVERNMENTAL INTEREST IS NOT EFFECTIVELY SERVED BY THE STOLEN VALOR ACT, IT CANNOT SURVIVE STRICT SCRUTINY REVIEW.

As with laws criminalizing seditious libel, the Stolen Valor Act attempts to protect the Government's reputation at the expense of free expression. The Act declares that it is intended "to enhance protections relating to the reputation and meaning of the Medal of Honor and other military decorations . . . ." Stolen Valor Act of 2005, PL 109–

437, 120 Stat 3266 (2006). In addition, the Act states as a Congressional finding that "[l]egislative action is necessary to permit law enforcement officers to *protect the reputation* and meaning of military decorations and medals." *Id.* at § 2 (emphasis added).

Additional legislative history further demonstrates that one of Congress' most important concerns when passing the Stolen Valor Act was the reputational interests of the military. Most statements by legislators who supported the Act are directed toward the honor that the military conveys through these awards. *See* Stolen Valor Act of 2005, 152 CONG. REC. H8819-01, H8820, 4 ("Those that impersonate combat heroes dishonor the true recipients of such awards"); *id.* at 3 ("[T]he Act] protects the precious medals that are awarded."). The debate cites the potential for false assertions from individuals that they received a medal to dilute the honor and significance of such awards. *Id.* at 10 (stating that the Act prevents attempts by "imposters to cheapen the value of these honors"); *id.* at 9 (stating that a false claim of having won a medal "dilutes the significance attached to each lawfully awarded decoration"); *id.* at 5 (asserting that false statements about the receipt of military honors have "denigrated he service, patriotism, and gallantry" of military personnel). These statements make it clear that the legislative intent behind the Act was to safeguard the esteem for the military and for Government service that the award of such medals was intended to inspire.

A. The reputation of the military is not a Government interest sufficiently compelling to restrict the First Amendment

The Court has made clear as a general principle that preserving respect for the Government is not a sufficiently compelling interest to justify the deprivation of First Amendment rights. *See Texas v. Johnson*, 491 U.S. 397, 418-20 (1989) In *Schacht v. United States*, this Court considered the more specific interest of protecting the reputation of the military when it assessed the constitutionality of a statute that criminalized dramatic theatrical portrayals that "tend to discredit" the military. 398 U.S. 58, 62-63 (1970). The defendant in *Schacht* was charged with violating 18 U.S.C. § 772(f), which stated that "[w]hile portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit that armed force*." (emphasis added). Schacht was charged and convicted for engaging in a street performance that was highly critical of the United States' involvement in the Vietnam War. Writing for the majority, Justice Black's opinion overturned the conviction and struck down the final clause of § 772(f) on First Amendment grounds, noting that "[a]n actor, like everyone else in our country, enjoys a constitutional right to freedom of speech, including the right to openly criticize" and that "[t]he final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First

Amendment." *Id.* at 63. Much like the unconstitutionality speech-restrictive statue in *Schacht*, the Stolen Valor Act aims, at its core, to criminalize speech that would "tend to discredit" the military.

Yet the Government suggests that diluting the meaning or significance of medals of honor, by allowing anyone to claim to possess such decorations, could reduce the motivation of soldiers to engage in valorous or dangerous behavior. In other words, the Government argues that the challenged provision of the Stolen Valor Act is designed to avert the serious substantive evil of disrespect for the military and its deleterious consequences.

In the case of judicial officers, this Court recognized long ago that respect for the judicial branch cannot be coerced through the threat of criminal process. In *Bridges v. California*, 314 U.S. 252 (1941), the Court overturned a contempt sanction against a labor leader for an out-of-court statement highly critical of a federal judge. The concern for the dignity and reputation of the courts simply did not justify the punishment: "an enforced silence, however limited, solely in the name of preserving the dignity of the [Government], would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Id.* at 271-72. Reflecting on *Bridges* in *New York Times v. Sullivan,* the Court stated,

> This is true even though the utterance contains half-truths and misinformation. Such repression can be

> justified, if at all, only by a clear and present danger of the obstruction of justice. If judges are to be treated as men of fortitude, able to thrive in a hardy climate, surely the same must be true of other Government officials, such as elected city commissioners.

Id. at 273 (internal citations and quotations omitted).

And the same surely must be true of members of the military. As the district court stated in *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1190-91 (D. Colo. 2010) (holding the Stolen Valor Act facially unconstitutional as a content-based restriction on speech), argued, No. 10-1358 (10th Cir. May 12, 2011), the Government's

> wholly unsubstantiated assertion is, frankly, shocking, and indeed, unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor...[T]he reputation, honor, and dignity military decorations embody are not so tenuous or ephemeral as to be erased by the mere utterance of a false claim of entitlement.

Id.

Protecting the armed forces from disrespect in the civilian world or from the dilution of their reputational standing American society fails to rise to a compelling Governmental interest.

B. The statute is not narrowly tailored to achieve the stated goal.

1. It has no demonstrated effect on recruitment.

During the House floor discussion on the statute, at least one member of Congress stated that the prospect of military medals served the purpose of inspiring others to serve, suggesting that the Act plays an important role in aiding the military's recruitment efforts. Stolen Valor Act of 2005, 152 CONG. REC. H8819-01, H8820, 7. ("Military decorations and medals honor our Nation's brave service men and women and inspire future generations to military service.").

While this Court has previously held that the Government has a valid interest in "raising and supporting the Armed Forces" (and, by proxy, in bolstering recruitment efforts),[5] the Government has not presented any evidence that its recruitment efforts have been affected by false claims of medal ownership. In fact, enlistment figures for the years before and after the passage of the Stolen Valor Act show that the statute does not appear to have had an appreciable effect on recruitment numbers. In percentage terms, a comparison between the year before the Stolen Valor Act was proposed (fiscal year

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[5] *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 67 (2006) (upholding the Solomon Act, which withheld funding from universities that disallowed military recruiters on campus).

2004) and the year after the Act was passed (fiscal year 2007) does not show any appreciable difference in recruitment numbers, with all four branches meeting their target numbers in both of those years.[6] Additionally, while a gradual increase in overall recruitment numbers took place between 2006 to 2008, there is nothing to suggest that this spike was related to the passage of the Act. Indeed, a host of other factors very well may have been responsible for the boost in recruitment numbers.[7]

2. **The Act is severely underinclusive because it does not address similar speech that would have the same effect on respect for the military.**

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[6] In fiscal year 2004, the Army (101%), Navy (101%), and Air Force (101%) all exceeded their active component recruitment goals, and the Marine Corps (100%) met theirs. LAWRENCE KAPP, RECRUITING AND RETENTION: AN OVERVIEW OF FY 2004 AND FY 2005 RESULTS FOR ACTIVE AND RESERVE COMPONENT ENLISTED PERSONNEL, Congressional Research Service (June 25, 2005), http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA481087. In fiscal year 2007, the Army (101%) and Navy (101%) exceeded their active component recruitment goals, and the Marine Corps (100%) and Air Force (100%) met theirs. Defense.gov, *DoD Announces Recruiting and Retention Numbers for FY 2007*, U.S. DEPARTMENT OF DEFENSE, October 10, 2007, http://www.defense.gov/releases/release.aspx?releaseid=11398.

[7] Lizette Alvarez, *Army Giving More Waivers in Recruiting*, THE NEW YORK TIMES, February 14, 2007, http://www.nytimes.com/2007/02/14/us/14military.html?pagewanted=all.

A statute is facially invalid if it so underinclusive that it would cast doubt on the compelling nature of the government's asserted interest. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) ("[P]atent . . . underinclusiveness . . . undermines the likelihood of a genuine [governmental] interest," and because a statute is underinclusive, it "provides only ineffective or remote support for the government's purpose."); *R.A.V. v. St. Paul*, 505 U.S. 377, 391, 112 S.Ct. 2538, 2547 (1992) (facially invalidating an ordinance that applied only to "fighting words" that provoke violence "on the basis of race, color, creed, religion or gender"); *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[T]he [challenged provision] is so woefully underinclusive as to render belief in purpose a challenge to the credulous.").

The Stolen Valor Act thus is facially invalid because it is not tailored to encompass the full range of threats to the motivation of soldiers posed by false statements relating to medals. Most obviously, it does not criminalize false claims about *another person's* receipt of military awards, which, under the Government's logic, would have the same negative effect. Nor does it criminalize the false representation made when a properly decorated soldier *denies* having won an award, a type of falsehood that could equally harm the esprit de corps in the armed forces. And finally, the stated goal of protecting soldier morale is itself underinclusive. The same justification could be used to defend laws criminalizing speech in other traditionally protected contexts, including domestic criticism of the Government's military and foreign policy. Indeed, it

seems more plausible that criticism of military missions would have more of an impact on soldier morale than the few instances when individuals make false claims about their military honors. While the desire to punish the uttering of such falsities is understandable, it simply is not compelling enough nor tailored with enough precision to justify establishing an additional exception to first Amendment protections.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to affirm the judgment of the Ninth Circuit Court of Appeals in favor of respondent.

/s/ J. Joshua Wheeler

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-210

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioners,

v.

XAVIER ALVAREZ
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROFESSOR JONATHAN D. VARAT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 704(b) of Title 18, United States Code. makes it a crime when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

The question presented is whether 18 U.S.C. § 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

Jonathan D. Varat is a professor of law and former Dean of the UCLA School of Law. He has taught and written on constitutional law, including the development and application of First Amendment law, for many years. Professor Varat's article, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L.Rev. 1107 (2006), was cited by the Ninth Circuit opinion below in this case. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010). In this brief, Professor Varat attempts to identify the characteristics of false factual speech that this Court has determined may be regulated consistently with the First Amendment and explain how the regulation of false factual speech without these characteristics does not comport with the First Amendment's comprehensive protection of pure speech and individual expressive autonomy. Professor Varat believes that the Stolen Valor Act is improperly directed at fully protected speech and unconstitutional. His main concern, however, is to further a coherent and workable doctrine of First Amendment law as it applies to deceptive speech.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record received notice of *amici's* intention to file an amicus brief at least ten days before the filing date, and have consented to this filing in letters that are filed with the Clerk of the Court with this brief.

SUMMARY OF ARGUMENT

The United States' assertion that all false factual speech is categorically not entitled to First Amendment protection for its own sake fundamentally conflicts with this Court's traditional comprehensive protection of pure speech under the First Amendment. It is inconsistent with this Court's resistance to creating categorical exceptions to the First Amendment and ignores this Court's recognition that all speech can be a vehicle for the expression of ideas and, hence, should be entitled to some degree of First Amendment protection. It also cannot be squared with this Court's traditional insistence that restrictions on pure speech for its communicative impact may be justified only by compelling government interests that cannot be served in less restrictive ways. Finally, it neglects the value of individual expressive autonomy, which this Court has repeatedly stated is protected by the First Amendment.

This Court should reaffirm and clarify that only proscription of false factual speech that causes concrete, targeted injury is permitted by the First Amendment. Those categories of false factual speech that this Court previously has recognized as deserving only limited First Amendment protection (for example, fraud and defamation) all involve concrete, targeted injury to individuals. This requirement protects against the government's use of prohibitions to impose selective punishment on dissidents and also respects individual expressive autonomy by allowing the regulation of false speech only where such speech causes concrete harm and interferes with the individual autonomy of listeners.

The Stolen Valor Act contains no requirement of concrete, targeted injury. Nor is it based on legislative findings of any such injury. Instead, the only harm the Act purports to prevent is a diffuse one to the significance of military honors. Accordingly, the prohibitions authorized by the Stolen Valor Act go well beyond the narrow category of false factual speech that this Court has previously found can be prohibited consistent with the First Amendment. As a content-based regulation on speech, the Stolen Valor Act, therefore, must be subject to strict scrutiny. Because the Act is not narrowly tailored to serve any compelling government interest, it should be found unconstitutional.

ARGUMENT

I. THE UNITED STATES' CATEGORICAL APPROACH THAT WOULD PROVIDE "AT MOST" ONLY LIMITED FIRST AMENDMENT PROTECTION FOR KNOWINGLY FALSE FACTUAL STATEMENTS FAILS TO PROTECT CORE FIRST AMENDMENT VALUES

Congress has made it a federal crime to represent oneself falsely, verbally or in writing, as having been awarded a military medal. It has done so based solely on a concern that such a false statement might influence the attitudes of those who hear or read such false speech. Specifically, Congress is concerned that reading or hearing such false statements conceivably may impair the reputation and meaning of military medals.[2] First Amendment

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[2] While we share the United States' view that the military honors program promotes important national interests and

values are implicated in even a knowingly false statement about oneself, suggesting that Congress should not be able to impose a criminal sanction on the basis of an alleged injury to a government interest that is so abstract, indirect, and empirically unsubstantiated. Those values are particularly weighty here because what Congress aims to suppress is the communicative impact of pure speech and its alleged tendency to influence listeners to think less well of the value of military awards. Accordingly, this is an especially proper occasion for invoking and reaffirming the well-established First Amendment principle that "more speech, not enforced silence" is the constitutionally preferred method of addressing potentially harmful speech.

In defending the Stolen Valor Act, the United States adopts a narrow view of the values protected by the First Amendment. The United States' view would essentially confine the First Amendment to its truth-seeking or enlightenment function and brush aside any concern with impairment of self-expression or opinion. As a consequence, the United States would demand too little in the way of needed justification for congressional prohibitions of pure speech.

At the core of the First Amendment is the powerful presumption that pure speech is to be protected against government regulation of its communicative impact. The United States

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values and we express our admiration for those who have properly been awarded military honors, the Stolen Valor Act nevertheless impermissibly infringes on the core value of the First Amendment to protect pure speech.

nonetheless urges this Court to view the broad category of knowingly false factual speech as effectively outside this core protection and deserving of limited First Amendment protection "at most." (Petitioner's Opening Brief ("POB") at 18.) In the United States' view, so long as a prohibition of false factual speech serves an "important government interest" and does not unduly chill protected speech, it does not run afoul of the First Amendment. (POB at 18-20.) Such a rule, however, would be a radical departure from the existing protections afforded by the First Amendment. It cannot be reconciled with the Court's general resistance to treating categories of pure speech as completely outside the shelter of the First Amendment. Nor would it respect the Court's traditional insistence that restrictions on pure speech for its communicative impact may be justified only in rare instances implicating truly overriding government interests that cannot effectively be served in less restrictive ways. In addition, such a rule would fail to take into account the full breadth of interests the First Amendment seeks to protect, some of which—especially the interest in self-expression—are inherently part of self-aggrandizing fabrications such as having been awarded a military decoration.

A. The United States' Proposed Treatment Of False Factual Speech Is Irreconcilable With The First Amendment's Comprehensive Protection Of Pure Speech

The First Amendment centrally and most fundamentally means that, "as a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter,

or its content." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (citation and internal quotation marks omitted). This prohibition is particularly robust with regard to "pure speech" (i.e., speech not intertwined in any way with conduct), which this Court has long held "is entitled to comprehensive protection under the First Amendment." *Tinker v. Des Moines Independent Cmty. School Dist.*, 393 U.S. 503, 506 (1969). Absent a compelling justification, the default position of the First Amendment is that the government may not regulate the content of pure speech. *See, e.g.*, *Ashcroft*, 535 U.S. at 573; *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) ("Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." (citation omitted)); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

The United States' assertion that false factual speech categorically is not entitled to any more than limited First Amendment protection fundamentally conflicts with this Court's traditional comprehensive protection of pure speech under the First Amendment in two significant ways. First, it asks this Court to declare a wide-ranging category of speech, including *all* knowingly false factual statements, regardless of their context or effect, or the nature of the government's purported justifications for criminalizing them, as entitled to at most only limited First Amendment protection. This contradicts this Court's frequent assertions that the number and scope of exceptions to the First Amendment's protection for pure speech must be strictly limited. Second, the United States asks the

Court to declare such speech essentially valueless and worthy of protection only where necessary to protect or further truthful speech. This largely ignores the Court's express recognition that all speech can be a vehicle for the expression of ideas, including one's self-presentation, and, hence, is entitled to considerably greater First Amendment protection than the United States would acknowledge.

1. *This Court Has Recognized Only Few And Narrow Exceptions To The First Amendment's Protection Of Pure Speech*

Because the protection of pure speech is at the heart of the First Amendment, this Court has identified only a small number of very narrow exceptions to the First Amendment's prohibition on content-based regulation of pure speech. In particular, this Court has recognized that the First Amendment "permit[s] restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V.*, 505 U.S. at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568,571-572 (1942)). These have included fighting words, *id.*, obscenity, *Roth v. United States*, 354 U.S. 476, 483 (1957), defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254-255 (1952), fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447-449 (1969) (per curiam), and speech integral to

criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

Allowing certain classes of speech to be subject to content-based regulation is in inherent tension with the First Amendment's solicitude for pure speech. As a result, this Court repeatedly has stated that these classes of speech must be "well-defined and narrowly limited." *Chaplinsky*, 315 U.S. at 572-572; *see also, e.g., Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2011) (hereafter "*Entertainment Merchants Ass'n*"). When the Court recently reaffirmed the need to contain these recognized exceptions to the First Amendment's comprehensive protection for pure speech in *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010), it sharply rejected as "startling and dangerous" any notion that new categories of unprotected speech could be recognized based on an "ad hoc balancing of relative social costs and benefits" or on a determination that certain speech was "valueless or unnecessary." *Id.* at 1585-86. Rather, it emphasized that only those categories of speech that historically have been recognized as subject to prohibition could be regarded as outside the protection of the First Amendment. *Id.*

This Court's view that exceptions to the First Amendment's protection for pure speech should be both rare and narrow is further evident from its repeated holdings shrinking the number and scope of already recognized exceptions. For example, the First Amendment's long-standing exception for "fighting words" has been given increasingly limited application by this Court. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 409 (1989) ("No reasonable onlooker

would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."); *Cohen v. California*, 403 U.S. 15, 20 (1971) ("While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.'"). Of similar import are the decisions limiting earlier recognized exceptions for libelous and obscene speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 268-69 (1964); *Miller v. California*, 413 U.S. 15, 23-24 (1973). Moreover, commercial speech, a category of speech to which the First Amendment was once considered not to apply, now enjoys broad First Amendment protection. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 758-70. And even when this Court has acknowledged the existence of additional categories of unprotected speech, such as "true threats," *Virginia v. Black*, 538 U.S. 343, 359-60 (2003), and child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), it has been scrupulously careful about confining those categories within narrow definitions demanding that the harmful impact of the speech on identifiable, individual victims be clear and compelling. *See, e.g., Ashcroft v. The Free Speech Coalition*, 535 U.S. 234 (2002) (declining to allow inclusion of virtual child pornography within the unprotected category of actual child pornography).

The United States' proposal that all false factual speech be treated as at best minimally protected by the First Amendment would create an exception to the First Amendment's prohibition of

content-based-regulations whose scope would go well beyond that of the exceptions this Court has previously recognized. Likewise, it would run contrary to this Court's efforts to maintain, if not expand, the existing margins of the First Amendment's protection. While, as the United States points out, this Court has found statutes aimed at various narrow categories of false factual statements, such as defamatory or fraudulent statements, to be consistent with the First Amendment, (POB at 20-28), it has never actually held that the First Amendment allows regulation of *every* false factual statement, regardless of its effect or context, so long as such regulation does not inhibit truthful speech. Though the United States isolates various statements in this Court's past decisions that false factual speech is not protected for its own sake, each of these decisions actually held that only certain narrow types of false factual speech could be prohibited. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64 (1964) (defamation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (libel); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (false speech causing emotional distress); *Herbert v. Lando*, 441 U.S. 153 (1979) (defamation). Carving out the broad swath of all false factual speech from the First Amendment's protection would, therefore, be a substantial contraction of the First Amendment.

Without carefully circumscribing the conditions under which false factual statements may be criminalized, the United States' approach would reverse the normal presumption against the suppression of pure speech and require speakers to prove that the communicative impact of their speech should not be subject to government restriction. That

reversal of presumptions is incompatible with the traditions of the First Amendment by relieving the United States of ***its*** normal burden to provide overriding, narrowly defined justifications for prohibiting pure speech because of the communicative impact of that speech. In doing so, the United States' approach risks teaching a systemically unfortunate lesson that speech must justify its freedom. To the contrary, government suppression of speech based on a potential influence on listener attitudes should be permissible only when the government can demonstrate truly powerful justifications for doing so.

2. *This Court Has Recognized That Even Classes Of Speech Formally Identified As Unprotected Remain Subject To Meaningful First Amendment Scrutiny*

In addition to limiting the number and scope of exceptions to the First Amendment's protection, the Court also has emphasized that even so-called "unprotected" categories of speech are neither entirely without value nor genuinely outside the protection of the First Amendment. Regulations directed at unprotected speech "can claim no talismanic immunity from constitutional limitations," but "must be measured by standards that satisfy the First Amendment." *New York Times*, 376 U.S. at 269. For this reason, this Court has tested even regulations directed only at unprotected classes of speech against the First Amendment and not infrequently has declared them invalid. *See, e.g.*, *Gooding v. Wilson*, 405 U.S. 518 (1972) (statute directed at fighting words violated First

Amendment); *Hustler*, 485 U.S. at 46, 57 (recovery for emotional distress caused by false speech violated First Amendment); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (portions of Communications Decency Act aimed at obscenity violated First Amendment). The Court has applied particularly stringent requirements to laws, such as the statute at issue, imposing criminal liability for unprotected speech. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 70 (1964) (criminal libel statutes should be "narrowly drawn" and "designed to reach words tending to cause a breach of the peace . . . or designed to reach speech, such as group vilification, 'especially likely to lead to public disorders'" (quoting Model Penal Code, Tent. Draft No. 13, 1961, s 250.7, Comments, at 44)).

Most significantly, as the United States acknowledges (POB at 48), even where a statute prohibits only unprotected speech, it may violate the First Amendment where it seeks to proscribe such speech for a reason unrelated to its "constitutionally proscribable content." *R.A.V.*, 505 U.S. at 383. Hence, the government may not regulate only a subset of unprotected speech based on its content except where "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id.* at 388. For example, this Court has found that an ordinance directed to the prohibition of a subset of fighting words violated the First Amendment because it was directed only at fighting words concerning a particular disfavored topic. *Id.* at 391. The First Amendment's prohibition on regulation of this type flows from the recognition that even unprotected speech is not "in all respects" worthless, but may at times be part of the expression of ideas and,

accordingly and most importantly, that its prohibition by the government may constitute an impermissible means of idea suppression. *Id.* at 385.

The United States' assertion that false speech is wholly without intrinsic value and, therefore, not entitled to any First Amendment protection unless its restriction would unduly chill true speech cannot be squared with this Court's recognition that regulation of even traditionally unprotected speech can implicate the First Amendment. There is no basis to conclude that false factual speech, alone of all classes of speech, is completely valueless and can never be part of the communication of ideas. Simply because a statement is false and fundamentally factual in nature does not mean that it cannot carry within it an idea that the United States may seek to suppress. To take one current example, assertions by segments of the population that the current President is not a United States citizen are fundamentally factual statements, yet they are inextricably intertwined with the expression of subjective beliefs concerning the trustworthiness and legitimacy of the current President. A regulation aimed at the prohibition of such statements could, therefore, be a vehicle for idea suppression. Many other types of false factual statements similarly are intertwined with the expression of contested ideas, including statements regarding the threat of climate change or statements concerning the impact of legislation on the federal budget. For this reason, even false factual speech may in certain circumstances have inherent worth and require protection for its own sake—not to mention that the First Amendment may also seek to protect such speech to curtail the risk that the United States becomes too quick to turn to speech control for

impermissible or simply gratuitous reasons. The United States' proposed treatment of false factual speech as largely categorically unworthy of any First Amendment protection ignores these possibilities.

B. The United States' Proposed Treatment Of False Factual Speech Neglects To Account For The First Amendment's Protection Of Self Expression

The United States' proposed rule for determining the constitutionality of prohibitions on false factual speech not only is at odds with the First Amendment's presumptive protection of pure speech, but it also essentially ignores the First Amendment's independent protection of self-expression. Although the United States purports to acknowledge that "[p]rotecting the right to self-expression is unquestionably an important value underlying the First Amendment[,]" POB at 51, it apparently takes the conclusory position that a false factual assertion about having received a military decoration does not impair that value at all. *Id.* at 52. This leaves open whether other forms of restrictions of false assertions about oneself might impair expressive autonomy.

The First Amendment protects not only the value of speech itself, but also the value of controlling one's own speech. This Court has frequently recognized that "[t]he individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *see also, e.g., Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 972

(2010) ("One fundamental concern of the First Amendment is to 'protec[t] the individual's interest in self-expression.'" (citing *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 534, n.2 (1980))); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–504, 104 (1984) ("[T]he freedom to speak one's mind is . . . a good unto itself" and "also is essential to the common quest for truth and the vitality of society as a whole."). As Justice Marshall explained, "[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity." *Procunier v. Martinez* 416 U.S. 396, 427-428 (1974) (Marshall, J., concurring), *rev'd in part on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989). The protection of self-expression also serves to "make men free to develop their faculties," *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969), and facilitates "individual self-realization," Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L.Rev. 591, 594 (1982).

For this reason, the First Amendment can be implicated even by regulations that suppress no speech at all—most notably in cases dealing with compelled speech. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court held that the private organizers of a parade could not be forced consistent with the First Amendment to include in their parade a group

expressing views with which they disagreed. That holding was founded on this Court's recognition that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Id.* at 573. *See also, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977) (First Amendment prohibits state from compelling individual to display "Live Free or Die" on his license plate); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (First Amendment prohibits requirement that students salute and pledge allegiance to the flag). The right not to be compelled to speak cannot be founded on the value of speech itself, but necessarily is based on the value of control over one's self-expression.

The United States' view that the prohibition of false factual speech is only of concern to the First Amendment when it chills truthful speech neglects the First Amendment's concern with expressive autonomy. Even when an individual's false factual statement otherwise lacks any inherent value, it reflects a choice by that individual of what to say and is therefore a form of self-expression. False statements about oneself, such as the statements targeted by the statute at issue, are particularly imbued with an individual's autonomy of expression. Indeed, they are an essential means by which many people—the Willy Lomans and Walter Mittys of the world—shape their public and private persona. Whether or not we approve of such deception (often self-deception), the choice to engage in it is indisputably a crucial aspect of the individual autonomy protected by the First Amendment.

Using speech to gain the respect of others, without harming the speaker's audience in any tangible or directed way—such as by taking something from the listeners—is a normal and routine part of self-expression that does include statements deliberately exaggerating or falsifying one's accomplishments. The United States' ability to control how people express themselves in their everyday lives as they negotiate their egos and insecurities should be extremely limited and narrowly circumscribed. False representations for the purpose of self-aggrandizement may be neither admirable nor attractive, but standing alone they are not usually understood as criminal. Accordingly, any determination of whether a prohibition of false statements runs afoul of the First Amendment cannot simply be based, as the United States urges, on whether the prohibition discourages truthful speech. To account for the full breadth of interests the First Amendment seeks to protect, the impact of such a prohibition on the ability of individuals to choose what to say, particularly when speaking about themselves, also must be meaningfully considered in determining its constitutionality.

II. ALLOWING PROHIBITIONS ONLY ON FALSE FACTUAL SPEECH THAT CAUSES CONCRETE INJURY WOULD BETTER COMPORT WITH THIS COURT'S PRECEDENT, THE PURPOSES OF THE FIRST AMENDMENT, AND THE LEGITIMATE REGULATORY INTERESTS OF THE GOVERNMENT

In lieu of the United States' inadequate proposed rule, this Court should affirm the Ninth

Circuit's holding below that only false factual speech that possesses other key characteristics may be prohibited without violating the First Amendment. *United States v. Alvarez*, 617 F.3d 1198, 1209-13 (9th Cir. 2010). The United States' purported justification based on a perceived but unsubstantiated harm that the speech might influence listeners to think less well of the value of government-awarded medals, or the true recipients of such medals, is entirely too speculative, diffuse, and abstract. To make the assertion of this sort of harm a basis for prohibiting pure speech, using what is essentially the balancing test proffered by the United States, would be to risk licensing the United States to outlaw broad swaths of false factual statements in the political, scientific, and historical realms, in a fashion that would tend toward establishing the government's role as the enforcer of truth without regard to particularized harms threatened by the false statements. Making explicit that only proscription of false factual speech causing targeted, concrete injury is permitted by the First Amendment would both be consistent with this Court's previous holdings and better account for the full breadth of interests protected by the First Amendment.

A. Categories Of False Factual Speech This Court Previously Has Held May Be Prohibited Under The First Amendment All Involve Individually Directed Concrete Injury

As the Ninth Circuit recognized, this Court never has allowed false speech to be regulated consistent with the First Amendment without finding that speech to possess other significant

characteristics. *Alvarez*, 617 F.3d at 1209-13. Of particular significance, those categories of false speech that the Court has recognized as deserving of only limited First Amendment protection all involve concrete targeted injury.

For example, defamatory lies are actionable not merely because the defendant has uttered knowingly false statements, but because such defamatory lies are "injurious to a private individual" and cause irreparable damage to an individual's reputation. *Gertz*, 418 U.S. at 347. Lies in cases involving privacy cause individuals "mental distress from having been exposed to public view." *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967). Intentionally inflicting emotional distress by telling a particular person a knowing falsehood is another category of actionable false speech with concrete harm targeted at a particular individual. *See, e.g.*, *Hustler*, 485 U.S. at 46. Lies to defraud someone into parting with something of value is an obvious example where speech inflicts concrete injury on particular individuals. Only one-to-one targeted lies that mislead the listener and cause financial injury amount to fraud or common law deceit. *See, e.g.*, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). And of course, the First Amendment does not protect false statements that may lead to immediate public panic, such as shouting fire in a theater. *Schenck v. United States*, 249 U.S. 47, 52 (1919). The injuries inflicted in these cases are obvious, directed, and palpable, and certainly not abstract.

In addition, lies that constitute perjury or false statements under oath or misrepresentations to the

government cause a concrete interference with government proceedings with particular and direct harms to individuals involved in those proceedings. *See Gates v. City of Dallas*, 729 F.2d 343, 345 (5th Cir. 1984); *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970); *United States v. Lattimore*, 215 F.2d 847, 860 (D.C. Cir. 1954); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 51 n.10 (1961). Accordingly, consistent with the First Amendment, these falsehoods also may be prohibited.

B. A Requirement Of Targeted, Concrete Injury Provides Appropriate Shelter For The First Amendment's Interests In Avoiding The United States' Suppression Of Ideas And Protecting Self-Expressive Autonomy, Without Unduly Constraining The United States' Ability To Protect The Public

Insisting that false factual speech cause targeted, concrete injury in order to be subject to prohibition under the First Amendment is a crucial limitation. Allowing the United States to police all deceptions regardless of the type of harm they inflict would, as discussed above, *see supra* Part I, lead to an intolerable contraction of the protections provided by the First Amendment. A concrete injury requirement, unlike the United States' proposed rule for false factual speech, would ensure that the United States will not use prohibitions of such speech to engage in idea suppression or too readily resort to restricting speech without a powerful reason to do so. It would also appropriately account for the First

Amendment's protection of expressive autonomy up to the point where overriding government interests in the protection of other individuals or other narrowly confined and carefully circumscribed concerns ought to be allowed to prevail.

The prohibition of even false factual speech may be a vehicle for the suppression of ideas. Rather than punishing speakers for the false content of their statements, the government may opt for selective enforcement as a means of punishing unpopular dissidents for the remaining content, even when in theory only the lies are actionable. Allowing the government to regulate false factual speech when the only harm at issue is an abstract, diffuse one to institutions or values—allegedly accomplished by influencing the attitudes of the listener—provides the government with a perilous opportunity to use its regulatory power to engage in this form of idea suppression.

The danger of selective enforcement is present whenever any speaker makes a false representation in the course of communication and the government takes notice (which is more likely to be the case, as here, when the government feels that the false statement is detrimental to the reputation and meaning of the government's own symbols). This danger is at its height, however, when the false factual speech targeted is addressed to wide audiences about broad institutional, social, or political issues rather than speech causing concrete injury.

For example, suppose a law were passed allowing prosecutors to bring criminal charges

against political candidates for making knowingly false statements in public discourse, such as a statement exaggerating one's achievements. Because the enforcement of such a law would not be necessary to protect against any concrete injury, prosecutors would be tempted to overlook statements by candidates the prosecutor views favorably. Accordingly, there would be a very high risk that prosecutors, consciously or unconsciously, would use their authority under such a law in a censorial or partisan manner. Limiting prohibitions on false speech to instances where there is targeted, concrete injury significantly decreases the risk that the government will regulate false speech in a discriminatory fashion.

Moreover, even where the government does not engage in selective enforcement, a law directed at knowing false statements of fact without any requirement of concrete injury would have an inevitable chilling effect on speech. A speaker always risks the possibility that his or her statements might be inaccurate and that even an inadvertent misstatement might erroneously be found by a jury or other fact-finder in the course of litigation to have been knowing. An aggressive or simply strict prosecutor, with no discriminatory enforcement motive, could put the speaker in that uncertain, risky position. Such a prospect may well deter speakers from taking the risk to speak out. This concern would be particularly acute for speakers who have reason to fear government retribution for their unpopular speech.

In addition, requiring the government to demonstrate a real threat that false speech will

produce targeted and concrete injury will provide greater room for self-expression. Self-aggrandizing false representations like those condemned by Congress in the Stolen Valor Act are likely to be of a more self-expressive sort than false representations deployed to induce listeners to part with something of value or otherwise threaten the integrity of a concrete proceeding involving individualized interests. Thus, the First Amendment interest is stronger and the government interest is weaker when all that the government asserts is that a false representation will influence listeners to think less well of military medals. False factual speech that creates only diffuse injury to values or institutions has little impact on listeners' autonomy and threatens no concrete harm to any individual. At the same time, regulation of speech that threatens only indirect, attenuated interests of the government places a much greater burden on speakers' autonomy. As a result, the promotion of individual expressive autonomy is on balance best served by allowing speakers to engage in false factual speech where no concrete injury will result.

When the government prohibits false factual speech in order to protect the individual autonomy of listeners from a speaker who is scheming to take something from them, the weight of the interests are reversed—the speaker's interest in self-expression is less and the government's interest in protecting potential victims is much greater. The need for intervention is more immediate, and the speaker's presentation of his persona is much less compelling. These targeted lies interfere with the listener's control over his own reasoning abilities and thereby exert control over another in a manner uniquely

offensive to human autonomy. Moreover, they threaten genuine concrete harm to individuals that the government has an interest in prohibiting. Prohibiting speakers from engaging in these narrow forms of deception, meanwhile, has a minimal impact on their own expressive autonomy. Accordingly, in the context of deceptive statements targeted at individuals, the First Amendment's interest in protecting the autonomy of speakers may give way to the protection of listeners' autonomy and the protection of those deceived from concrete harm.

III. THE STOLEN VALOR ACT CANNOT QUALIFY FOR CATEGORICAL EXCLUSION FROM THE FIRST AMENDMENT, NOR FOR ANY SUGGESTED CATEGORY OF LIMITED PROTECTION

The Stolen Valor Act contains no requirement that individual concrete harm be shown. As written, the statute is concerned only with the act of false representation and does not require the government to demonstrate any resulting injury. There is no element analogous to the requirement for defamation that the speech be "injurious to a private individual," *Gertz*, 418 U.S. at 347, or the requirement for fraud that the misrepresentation succeed in misleading a victim, *Ill. ex rel. Madigan*, 538 U.S. at 620. Nor does it require that the speaker intend or attempt to produce any individualized harm to another as a result of the false representation.

Furthermore, the Stolen Valor Act is not based on legislative findings of any such concrete, individualized harm. Instead, the only harm

Congress purported to identify is to the significance of military honors. Specifically, Congress found that "[f]raudulent claims surrounding the [specified honors] damage the reputation and meaning of such decorations and medals." Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. at 3266 (2006). The United States implies that false statements about military honors harm the value of the awards themselves by diluting the prestige of the awards, thereby undermining the military's ability to convey gratitude and recognition and to foster morale within the armed forces. (POB at 41.) This harm is a highly diffuse one—to institutions and systemic values—that does not resemble the types of concrete harm involved in other restrictions on false speech. In contrast to defamation and fraud laws, the Stolen Valor Act is not aimed at speech that causes harm in any tangible sense. Likewise, in contrast to laws prohibiting certain misrepresentations to the government, the Stolen Valor Act cannot plausibly be said to protect against any interference with a specific government proceeding. The harmful effects it targets, if they exist,[3] are to be measured upon

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[3] Neither Congress nor the United States as Petitioner has substantiated that false representations of having received military decorations are likely to undermine the government's asserted interests. Probably equally plausible is that such false claims will be ignored, or easily detected and debunked. In either case, the purported baleful effects are unlikely to occur in any more than a *de minimis* way. It is also more than possible that false representations like those made by Mr. Alvarez will prompt further discussion of how important it is to appreciate those who truly were awarded medals of valor and thereby indirectly further the government's interests. This may be one of those instances in which false speech ends up reinforcing the truth and its importance by bringing about "the clearer perception and livelier impression of truth, produced by its

entire military programs or governmental institutions or perhaps diffused among the population that derives pride from military honors.

Because of the abstract and diffuse nature of the harm it targets, exempting the Stolen Valor Act from strict scrutiny under the First Amendment is unjustified for three reasons. First, it is precisely the type of regulation that is susceptible to abuse, particularly as it is expressly grounded in a government self-interest rationale. The Court has repeatedly rejected the notion that actions for defamation on the government itself could be constitutionally permissible. *See, e.g., New York Times*, 376 U.S. at 292 ("[N]o court . . . has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923) (internal quotation marks omitted))); *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (recognizing that "the spectre of prosecutions for libel on government" is one that "the Constitution does not tolerate in any form"). The concern underlying those cases—that any tool the government could use to require respect from its citizens would be subject to abuse—should make the Court here skeptical and cautious about the supposed need to prevent the devaluing of military honors.

Second, and relatedly, the Stolen Valor Act seeks to target only a subset of false factual speech without any finding that that speech is a particularly

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collision with error." *New York Times*, 376 U.S. at 279 n.19 (quoting Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15) (internal quotation marks omitted).

harmful form of deceptive speech. This is precisely what this Court's decision in *R.A.V.* prohibits. *R.A.V.* holds that the government may not simply pick and choose what unprotected speech will be subject to regulation based on the content of that speech unless such speech is being singled out precisely for the reasons it is unprotected. *R.A.V.*, 505 U.S. at 388-89. The Stolen Valor Act singles out false factual speech concerning military honors not because such lies are especially pernicious or harmful deceptions relative to other types of lies, but rather because such speech concerns military symbols that the government would like to shield from disrespect. This is no different than if the government made it a crime to make a knowingly false statement about the President or the U.S. military or the Founding Fathers. As *R.A.V.* holds, the government simply cannot do this without being subject to strict scrutiny.

Third, the type of false speech governed by the Stolen Valor Act is particularly well suited to correction by counterspeech. Whatever impact the misrepresentations of military honors may have, it is assuredly not immediate or irreparable—leaving opportunity for others to question and rebut any false claims before the purported harm ensues. *See Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); *cf. Hustler*, 485 U.S. at 52 (reasoning that defamatory falsehoods "cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective"). Moreover, for any given misrepresentation, at least some public databases

exist to verify the receipt of particular medals or decorations. *See, e.g., Alvarez*, 617 F.3d at 1210 n.11 (identifying two websites that make lists of Congressional Medal of Honor recipients publicly available). And while not every misrepresentation will be subject to such easily verifiable investigation, there is reason to think that the ones sufficiently prominent to have any conceivable effect on the significance of military honors will provoke further inquiries, as was the case for Mr. Alvarez. The Court has consistently recognized that more speech and not enforced silence is the "preferred First Amendment remedy." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982). Here, because counterspeech is on the whole likely to be both available and effective in combating the harm Congress identified, that harm cannot justify the First Amendment exception that the United States seeks.

IV. THE STOLEN VALOR ACT CANNOT SURVIVE STRICT SCRUTINY

Because the Stolen Valor Act imposes a content-based restriction on speech that is not categorically excluded from First Amendment protection, and does so because the communicative impact of the speech is thought to influence listeners' attitudes toward a government program, it should be evaluated under a strict scrutiny standard—meaning it must be "justified by a compelling government interest and . . . narrowly drawn to serve that interest." *Entm't Merchants Ass'n*, 131 S. Ct. at 2738. As even the dissent in the Ninth Circuit acknowledged, the Stolen Valor Act cannot satisfy that standard. *See Alvarez*, 617 F.3d at 1232 n.10 (Bybee, J., dissenting).

First, as to the government interest at stake, the discussion in the previous section demonstrates why the purported interest is far from compelling. The United States argues that it has a compelling interest in protecting the integrity of the military honors system. (POB at 41.) Although that may be a valid and valuable government objective in the abstract, the United States provides no argument as to how this interest supports the limitation of speech rights. As the Court explained in analogous circumstances in *Texas v. Johnson*, "[t]o say that the government has an interest in encouraging proper treatment of the flag . . . is not to say that it may criminally punish a person for burning a flag as a means of political protest." 491 U.S. at 418.

The United States attempts to limit *Johnson*'s reasoning to state efforts to censor criticism of itself and argues that the Stolen Valor Act is directed at a distinct type of speech. (POB at 44-46.) But as the language quoted by the United States demonstrates, the interest asserted and rejected in *Johnson* was broader than that. Texas argued that the flag was a "symbol of . . . national unity," and that "if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited." (POB at 45 (quoting *Johnson*, 491 U.S. at 413).) Although the Texas statute was focused on a form of political protest as opposed to false representations, the ultimate *harm* it purported to prevent was essentially identical to the one at issue in this case. In short, the Texas statute, like the Stolen Valor Act,

was aimed at protecting the value of a government-created symbol.

Second, the Stolen Valor Act is not narrowly tailored to serve the United States' specified interest. The very premise that restricting false claims of military honors preserves the system's integrity writ large is speculative, falling far short of the required showing that the "curtailment of free speech [is] actually necessary to the solution." *Entertainment Merchants Ass'n*, 131 S. Ct. at 2738; *see also id.* at 2739 (statute was not narrowly drawn where the state had shown "at best some correlation" between the targeted speech and the purported harm it sought to prevent). Indeed, it is unclear what causal mechanism Congress had in mind in linking false claims of military honors with a decline in the value of those honors. Falsely laying claim to something that other people value may not automatically lead to a dilution of the value of that object. For example, a person lying about his height or weight does not dilute or affect the true height or weight of others. Moreover, any negative effect a false claim concerning military honors would have on such honors would require, at a minimum, that the claim reach a sufficiently broad audience, which would in turn make it very likely that the statement would be investigated and corrected without any government involvement. (For similar reasons, the United States' claim that the "cumulative force of all such misrepresentations" would "tarnish the meaning of military honors" (POB at 49) is at least equally speculative and readily subject to correction.)

The availability of less restrictive alternatives—such as the creation of more robust,

publicly available databases of honors recipients, in conjunction with the effectiveness of counterspeech as described above—confirms that the restriction is unnecessary. The United States argues that some unspecified number of records have been lost, "rendering some claims unverifiable." (POB at 50.) This vague assertion does not even speak to the relevant issue—whether the number of lost records is so high, and a newly constructed database in turn would be so incomplete, that it could not effectively safeguard the value of military honors in the aggregate. Accordingly, it does not satisfy the United States' burden to prove that this alternative solution would be ineffective. *See Reno*, 521 U.S. at 879 (noting "the absence of any detailed findings by the Congress" in rejecting the United States' attempt to rebut the availability of less restrictive alternatives); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129-30 (1989) (emphasizing the insufficient congressional record on how effective an alternative technological solution would be).

CONCLUSION

Because the Stolen Valor Act lacks a requirement of concrete, targeted injury, it should be subject to strict scrutiny under the First Amendment. The Stolen Valor Act cannot survive such scrutiny and is, therefore, unconstitutional.

Respectfully submitted,

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UNITED STATES, PETITIONER,

v.

XAVIER ALVAREZ, RESPONDENT.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR VETERANS OF FOREIGN WARS OF THE UNITED STATES; AMVETS; DISABLED AMERICAN VETERANS; JEWISH WAR VETERANS OF THE UNITED STATES; MILITARY ORDER OF THE WORLD WARS; VIETNAM VETERANS OF AMERICA; MILITARY OFFICERS ASSOCIATION OF AMERICA; NON-COMMISSIONED OFFICERS ASSOCIATION; NATIONAL ASSOCIATION FOR UNIFORMED SERVICES; ASSOCIATION OF THE UNITED STATES ARMY; ASSOCIATION OF THE UNITED STATES NAVY; AIR FORCE ASSOCIATION; MARINE CORPS LEAGUE; AIR FORCE WOMEN OFFICERS ASSOCIATED; RESERVE OFFICERS ASSOCIATION; ARMY RESERVE ASSOCIATION; FLEET RESERVE ASSOCIATION; NATIONAL GUARD ASSOCIATION OF THE UNITED STATES; MILITARY ORDER OF THE PURPLE HEART; DISTINGUISHED FLYING CROSS SOCIETY; SPECIAL FORCES ASSOCIATION; U.S. ARMY RANGER ASSOCIATION, INC.; FLAG AND GENERAL OFFICERS' NETWORK; WEST POINT ASSOCIATION OF GRADUATES; AND ASSOCIATION OF GRADUATES, U.S. AIR FORCE ACADEMY AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Section 704(b) of Title 18, United States Code, makes it a crime when anyone "falsely represents himself or herself, * * * verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

The question presented is whether 18 U.S.C. 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

"These I earned with blood."[2]

So stated Marine Lance Corporal Evan Reichenthal, referring to the Combat Action Ribbon and Purple Heart he was awarded after losing his legs to an improvised explosive device in Afghanistan. Contrary to the arguments of the parties below, this case is not about protecting the reputations of heroes such as Lance Corporal Reichenthal; there is nothing that charlatans such as Xavier Alvarez can do to stain their honor.

Under both this Court's First Amendment precedents and the Stolen Valor Act itself, 18 U.S.C. § 704, there is a nearly limitless range of contemptible expression and expressive conduct in which a person such as Alvarez may engage regarding military awards, including those he has not earned. He may burn them, deface them, or mutilate them. *Texas* v. *Johnson*, 491 U.S. 397 (1989). He may disparage them and denigrate their

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. Pursuant to S. Ct. R. 37.6, *amici curiae* certify that no counsel for a party authored any part of this brief, nor did any person or entity, other than the *amici*, their members, or their counsel, make a monetary contribution to fund the preparation or submission of this brief.

[2] Natalie Sherman, *You Get Used to Being Shot At*, Boston Herald, Nov. 11, 2011, available at 2011 WLNR 23543262.

worth. *Street* v. *New York*, 394 U.S. 576, 592-93 (1969). He may mock or condemn the heroes who risked or even sacrificed their lives to earn them. *Snyder* v. *Phelps*, 562 U.S. ___, 131 S. Ct. 1207 (2011). He may damn the Government that awards them and denounce in the harshest terms the military actions that gave rise to them. *Cohen* v. *California*, 403 U.S. 15 (1971). He even may declare that he should have received an award himself, or that the awards' actual recipients were not deserving. He simply may not wear or claim them as his own.

Amici curiae are 25 military and veterans service organizations who collectively represent millions of current and former members of the U.S. Armed Forces, including members of the Active Component, Reserves, and National Guard; currently serving, separated, disabled, and retired personnel; officers and enlisted; and members of the Army, Navy, Air Force, Marine Corps, and Coast Guard. Their members collectively have earned virtually every available military decoration, medal, and badge, including the Medal of Honor. The Appendix contains a brief description of each *amicus* group. *Amici* share a strong interest in preventing pretenders from appropriating for themselves, and enjoying the benefits of, the goodwill and prestige associated with military awards.

STATEMENT

The Stolen Valor Act provides, in relevant part:

> Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b). The Act provides enhanced penalties of imprisonment for up to one year if the "decoration or medal involved in [the] offense" is the Congressional Medal of Honor, *id.* § 704(c)(1), Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star, or Purple Heart, *id.* § 704(d).

The Act applies to military decorations, medals, and badges (collectively, "military awards"). A "decoration" is "a distinctively designed mark of honor denoting heroism, or meritorious or outstanding service or achievement."[3] Decorations

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[3] *Wear and Appearance of Army Uniforms and Insignia*, Army Reg. (AR) 670-1, ¶ 29-6(a) (Feb. 3, 2005); *U.S. Navy Uniform Regulations*, § 5302(1)(b) (Jan. 2006); *Marine Corps Uniform Regulations*, Marine Corps Ord. (MCO) P1020.34G, § 5101(2) (Mar. 31, 2003).

include, but are not limited to, those listed above, as well as the Distinguished Service Medal, Legion of Merit, Distinguished Flying Cross, and Bronze Star Medal.[4]

The term "medal"[5] embraces decorations, the Good Conduct Medal,[6] and service medals, which generally "denote honorable performance of military duty within specific limited dates in specified geographical areas."[7]

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[4] *Military Awards*, AR 600-8-22, ¶ 3-2(a) (Dec. 11, 2006); AR 670-1, ¶ 29-6(a); accord *Navy and Marine Corps Awards Manual*, Sec'y Navy Instr. (SECNAVINST) 1650.1H, Ch. 1, App. B, § a (Aug. 22, 2006); *id.* § 230; *U.S. Navy Uniform Regulations*, § 5305(1); MCO P1020.34G, § 5102(5). The Army also classifies unit awards such as the Presidential Unit Citation as "decorations," AR 600-8-22, ¶ 7-12(a), but the Navy and Marine Corps do not, *U.S. Navy Uniform Regulations*, §§ 5302(1)(c), 5306; MCO P1020.34G, § 5101(2)-(3).

[5] AR 600-8-22, at 184; see also AR 670-1, ¶ 29-6(d); *U.S. Navy Uniform Regulations*, § 5302(1)(e); MCO P1020.34G, § 5101(5).

[6] AR 600-8-22, ¶ 4-1.

[7] AR 600-8-22, ¶ 5-1. Whereas the Army broadly refers to all medals other than decorations and the Good Conduct Medal as "service medals," AR 600-8-22, ¶ 5-1, the Department of Defense recognizes three categories of medals: campaign, expeditionary, and service. 1 *Manual of Military Decorations and Awards*, Dep't of Def. Manual (DoDM) 1348.33, ¶ 4(a) (Oct. 12, 2011). The Navy, Air Force, and Marine Corps categorize most medals as "campaign and service awards." SECNAVINST 1650.1H, Ch. 1, App. B, § d; *id.* § 41[illegible]; *Air Force Awards and Decorations Program*, Air Force Instr. (AFI) 36-2803, ¶¶ 6-1.6.3 (June 15, 2001); *Dress and Personal Appearance of Air Force*

Finally, a "badge" is "awarded to an individual for identification purposes, or for attaining a special skill or proficiency."[8] Examples include the Combat Action Badge, Expert Infantryman Badge, and Parachutist badges. The term "badge" also includes "tabs authorized to indicate skill," including the Ranger and Special Forces tabs.[9]

Respondent Xavier Alvarez was an elected member of the Three Valley Water District Board of Directors. Pet. App. 4a. In September 2007, the Government filed a one-count Information against Alvarez,[10] charging him with violating the Stolen Valor Act, 18 U.S.C. § 704(b), by falsely declaring, during a joint meeting with a neighboring water district board, that he had been "awarded the Medal of Honor." Pet. App. 4a. The Government later filed a superseding Information against Alvarez, alleging that he also violated the Stolen Valor Act on a different occasion by making other false claims about receiving the Medal of Honor. J.A. 12-13.

The District Court denied Alvarez's motion to dismiss the Information, holding that the First

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Personnel, AFI 36-2903, ¶¶ 11-5 (July 18, 2011); MCO P1020.34G, § 5102(8).

[8] AR 670-1, ¶ 29-13; accord *U.S. Navy Uniform Regulations*, § 5302(1)(g); MCO P1020.34G. § 5101(7); see also AFI 36-2903, at 174-77.

[9] AR 670-1, ¶ 8-2(b), (d).

[10] Information, Dist. Ct. Dock. #1, at 1-2 (Sept. 26, 2007).

Amendment does not protect "false statements made knowingly and intentionally * * * even when political in nature." Pet. App. 142a. It further declared that, in any event, Alvarez's false statement was "not political in nature," but rather "a lie intended to impress others present at the meeting." Pet. App. 143a.

Following this ruling, Alvarez agreed to plead guilty to Count 1, regarding his lies at the water board meeting, and acknowledged that he was factually guilty of both counts.[11] Under his agreement, Alvarez retained the right to appeal the court's denial of his First Amendment challenge to the Stolen Valor Act. Pet. App. 1a-2a. The court accepted Alvarez's plea and sentenced him to three years of probation; a $5,000 fine; a $10 special assessment; and 416 hours of community service, which the court recommended occur at a veterans hospital.[12]

Alvarez appealed his conviction, and a split panel of the Ninth Circuit reversed it, ruling that the Stolen Valor Act is "facially invalid," and had been "unconstitutionally applied" to Alvarez. Pet App. 39a. The majority began by holding that the Act is subject to strict scrutiny, because the First Amendment generally protects false speech, *id.* at

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[11] Plea Agreement for Defendant Xavier Alvarez, Dist. Ct. Dock. #31, at 1-2, ¶¶ 2-3 (Apr. 30, 2008).

[12] Judgment and Probation/Commitment Order, Dist. Ct. Dock. #41, at 1-2 (July 23, 2008).

2a-4a, 32a, 35a, particularly "false statements of fact" by satirists, method actors, poets, and fiction authors, *id.* at 31a-32a. The majority conceded that the Government has a "compelling interest[] in preserving the integrity of its system of honoring our military men and women." *Id.* at 37a. It determined, however, that the Stolen Valor Act is not a "narrowly tailored means of achieving that noble interest," because the "remedy of 'more speech' [i]s * * * available to repair any harm" caused by lies about military awards. *Id.* at 37a-38a.

Judge Bybee dissented, declaring that "[f]alse statements are unprotected by the First Amendment except in a limited set of contexts where such protection is necessary 'to protect speech that matters.'" *Id.* at 42a, quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). He stated that protecting "false, self-aggrandizing statements by public servants" is not necessary to preserve any constitutionally valuable speech. *Id.* at 72a. Thus, there was no need to subject the Act to strict scrutiny, *id.* at 76a, and Alvarez's as-applied challenge also failed, *id.* at 69a-70a, 72a. He further concluded that the Act could not reasonably be interpreted as applying to fictional or satirical works. *Id.* at 88a-90a.

The Government moved for rehearing and rehearing *en banc*, but the Ninth Circuit denied the motion. *Id.* at 91a-92a. Seven judges dissented from the court's refusal to rehear the case *en banc*. *Id.* at 116a; see also *id.* at 135a.

SUMMARY OF ARGUMENT

This case is about theft, not lying in general. Alvarez, and others like him, have misappropriated for their own benefit an unearned share of the two centuries' worth of goodwill and prestige associated with American military awards. As the panel below recognized, "[T]he most obvious reason people lie about receiving military honors is because they believe that their being perceived as recipients of such honors brings them acclaim." Pet. App. 23a. In this case, Alvarez's own attorney admitted, "Mr. Alvarez told a lie to try to make himself look good in the eyes of his constituents and colleagues."[13]

The principal question in this case is whether the First Amendment allows the Government to prevent impersonators from wrongfully attempting to misappropriate for themselves the intangible, non-pecuniary benefits and goodwill—the "acclaim," Pet. App. 23a—that have become associated with military awards as a result of the Government's longstanding efforts. Thus, although *amici* agree with the Government's showing that the Act should not be subject to strict scrutiny—because the First Amendment generally does not protect false speech, unless such protection is necessary to prevent chilling of other, more valuable speech—this Court need not reach that broader issue.

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[13] Defendant's Position Re: Sentencing, Dist. Ct. Dock. #35, at 4 (July 7, 2008).

Part I begins by providing crucial context for the Stolen Valor Act, demonstrating that the problem of people falsely claiming to have received military awards that they did not, in fact, earn is both serious and widespread. Such imposters—who have included state and federal officials, as well as many other successful, prominent people—have enjoyed undeserved praise, honors, and other intangible, non-pecuniary benefits by wrongfully taking advantage of the goodwill associated with those awards.

Part II demonstrates that, under this Court's ruling in *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Committee*, 483 U.S. 522, 533 (1987), Congress may, consistent with the First Amendment, prohibit charlatans from wrongfully attempting to tap into the enormous reservoir of goodwill and prestige associated with military awards. The Government created these awards, endowed them with meaning, and cultivated their reputation over the course of decades by establishing and enforcing strict requirements for them. The Government's agents—Soldiers, Sailors, Airmen, Marines, and Coast Guard members—hallowed these awards through their service, sacrifice, and achievements. These emblems are thus akin to "certification marks," attesting to the valor and accomplishments of their recipients. Regardless of its authority under the First Amendment to punish false statements in general, the Government constitutionally may prevent others from reaping, or

attempting to reap, the intangible fruits of this labor.

This Part also shows that the Government's authority to bar third parties from *wearing* unearned military awards with the intent to deceive others, see 18 U.S.C. § 704(a); see also *Schacht* v. *United States*, 398 U.S. 58, 61 (1970); *Smith* v. *Goguen*, 415 U.S. 566, 596 (1974) (Rehnquist, J., dissenting), strongly suggests that Congress may likewise prohibit people from falsely *claiming* to have received those awards, 18 U.S.C. § 704(b). During the Revolutionary War, General George Washington established the earliest ban on the unauthorized wearing of military awards,[14] and Congress has prohibited such conduct for nearly a century, see, *e.g.*, Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286, *formerly codified at* 10 U.S.C. § 1425 The Stolen Valor Act is a constitutionally permissible extension of such provisions.

For these reasons, this Court should reverse the Ninth Circuit's ruling, and uphold the Stolen Valor Act.

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[14] Gen. George Washington, Gen. Orders (Aug. 7, 1782), *in* 24 *The Writings of George Washington from the Original Manuscript Sources*, 1745-1799, at 487, 487 (John C. Fitzpatrick, ed. 1938).

ARGUMENT

I. FALSE CLAIMS ABOUT MILITARY DECORATIONS, MEDALS, AND BADGES ARE A SERIOUS, WIDESPREAD PROBLEM.

On January 25, 2008, during a combat reconnaissance patrol in Afghanistan, Staff Sergeant Robert J. Miller's squad was ambushed by "a large, well-coordinated insurgent force * * * assaulting from elevated positions with ample cover."[15] His patrol was exposed, "totally vulnerable to enemy rocket propelled grenades and automatic weapon fire."[16]

> [W]ith total disregard for his own safety, [Staff Sergeant Miller] called for his men to quickly move back to covered positions as he charged the enemy over exposed ground and under overwhelming enemy fire in order to provide protective fire for his team. While maneuvering to engage the enemy, Staff Sergeant Miller was shot in his upper torso. Ignoring the wound, he continued to push the fight, moving to draw fire from over one hundred enemy fighters upon himself. He

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[15] Medal of Honor Official Citation, Staff Sergeant Robert J. Miller (Oct. 6, 2010), *available at* http://www.army.mil/medalofhonor/miller/citation.html (last referenced Nov. 28, 2011).

[16] *Ibid.*

> then again charged forward through an open area in order to allow his teammates to safely reach cover. After killing at least 10 insurgents, wounding dozens more, and repeatedly exposing himself to withering enemy fire while moving from position to position, Staff Sergeant Miller was mortally wounded by enemy fire. His extraordinary valor ultimately saved the lives of seven members of his own team and 15 Afghanistan National Army soldiers.[17]

Staff Sergeant Miller was awarded the Congressional Medal of Honor for his uncommon valor.

Hearing of such gallant exploits fills most people with a sense of awe, gratitude, and admiration. And it is the desire to evoke such feelings in others that generally motivates impersonators like Alvarez to falsely claim they received military honors that they did not, in fact, earn. The Stolen Valor Act is a narrow, carefully tailored response to the ever-growing number of people falsely claiming to have received prestigious military awards.[18]

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[17] *Ibid.*

[18] See generally B.G. Burkett & Glenna Whitley, *Stolen Valor: How the Vietnam Generation Was Robbed of Its Heroes and Its History* (1998).

The Ninth Circuit misapprehended, or erroneously minimized, both the scope and nature of the problem. See Pet. App. 38a ("[T]he greatest damage done seems to be to the reputations of the liars themselves."). Pretenders have included a U.S. Attorney,[19] Member of Congress,[20] ambassador,[21] judge,[22] Pulitzer Prize-winning historian and bestselling author,[23] manager of a Major League

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[19] Chris Roberts, *State Withdraws Herring's Hero Status*, El Paso Times, July 2, 2010, available at 2010 WLNR 13296932 (explaining that former U.S. Attorney and state senator Charles Ferguson Herring had not earned the Navy Cross, three Purple Hearts, and a Bronze Star, as he contended in an oral history).

[20] Bryan Denson, *Cooley Convicted of Lying*, Oregonian, Mar. 19, 1997, available at 1997 WLNR 6186536 (discussing former Oregon Congressman Wes Cooley's state law conviction for falsely claiming in a voter pamphlet that he served in "Army Special Forces, Korea").

[21] Thomas Farragher, *Lies Seen Catching Up With Top Officials, Even in the Grave*, Boston Globe, Dec. 14, 1997, available at 1997 WLNR 2350132 (discussing the exhumation of former U.S. Ambassador to Switzerland Larry Lawrence from Arlington National Cemetery, after it was discovered that he had not served in the Merchant Marine or suffered a severe head injury from a German torpedo slamming into his ship).

[22] Linda Young, *Judge Censured Over Fake Medal*, Chicago Tribune, July 25, 1995, available at 1995 WLNR 4564620 (discussing Kane County Circuit Judge Michael F. O'Brien, who falsely claimed to have earned two Medals of Honor and purchased two such medals, displaying one in his chambers).

[23] Josh Tyrangiel, *A History of His Own Making*, Time, July 2, 2001, available at http://www.time.com/time/magazine/

Baseball team,[24] Navy Captain,[25] police chief,[26] top executive at a world-famous research laboratory,[27] director of state veterans programs,[28]

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article/0,9171,165175,00.html (discussing historian Joseph Ellis' admittedly false claims during class lectures that he had served as a platoon leader and paratrooper in Vietnam and on General William Westmoreland's staff).

[24] Jason Diamos, *Jays' Manager is Hounded by War Tales*, New York Times, Dec. 15, 1998, available at 1998 WLNR 2974342 (discussing the admission of Tim Johnson, then-manager of the Toronto Blue Jays, that he "had lied on his resume and in stories he had told his players about having been in combat in Vietnam").

[25] *Making a Sham of Military Honors*, Virginian-Pilot & Ledger Star, Aug. 9, 2004, available at 2004 WLNR 3452826 (explaining that Navy Capt. Roger Dean Edwards had an "impressive chest of medals" including the Silver Star, Legion of Merit, and Purple Heart, but "nearly half the medals he wore were fraudulent").

[26] Perry Brothers, *Veteran Pleads Guilty to Lying*, Cincinnati Enquirer, Mar. 14, 2000, available at 2000 WLNR 10389561 (discussing false claims of Donald R. Nicholson, former Chief of Police for Amelia, Ohio, that he earned the Distinguished Service Cross).

[27] Liz Chapman, *Jackson Lab Official Resigns, Warren Cook Sr. Admits to Including False Listings on Resume*, Bangor Daily News, Sept. 30, 2003, available at 2003 WLNR 1718170 (discussing the resignation of the former vice president of government relations for Jackson Laboratory, who "admitted he falsely listed the prestigious Navy Cross as a military accomplishment on his job resume").

[28] Adrienne Lu, *Ex-N.J. Veterans Director Lied About War Record*, Philadelphia Inquirer, Dec. 7, 2008, available at 2008

university administrator,[29] pastor,[30] candidate for countywide office,[31] mayor,[32] physician,[33] and more than one police officer.[34]

WLNR 23511558 (discussing William Devereaux, the former N.J. Director of Veterans Programs who stepped down after admitting that he lied about receiving a Purple Heart, Bronze Star, and Soldier's Medal as a paratrooper in Vietnam).

[29] Vimal Patel, *Lies Catch Up to Kemos*, The Eagle, June 27, 2010, available at 2010 WLNR 12961531 (discussing the resignation of Alexander Kemos, former Senior Vice President for Administration of Texas A&M University, because of his "false claims of being an ex-Navy SEAL").

[30] Associated Press, *Exposing the Phony SEALs*, Herald News, May 12, 2011, available at 2011 WLNR 12129433 (false claim about having served as a Navy SEAL).

[31] Louise Popplewell, *Navy Says Candidate Was No SEAL*, Victoria Advocate, Mar. 3, 2000, available at http://tinyurl.com/8yeze5k (false claim about having served as a Navy SEAL).

[32] John Crewdson, *False Courage: Claims for Top Military Honors Don't Hold Up*, Chicago Tribune, Oct. 26, 2008, available at 2008 WLNR 20423903 (false claim of John Agenbroad, mayor of Springboro, Ohio, about receiving the Silver Star).

[33] *Ibid.* (false claim about receiving the Silver Star).

[34] *Silver Star Faker Avoids Jail, Loses Cop Job*, Marine Corps Times, Dec. 14, 2009, available at 2009 WLNR 26014214 (false claim about receiving the Silver Star); see also Dannie Oliveaux, *Sumner Man Convicted for Fake Medals*, Bonney Lake & Sumner Courier Herald, Mar. 23, 2009, available at http://www.blscourierherald.com/news/41714627.html.

An investigation by the *Chicago Tribune* revealed that, of the 333 people listed in the online edition of *Who's Who* as having received a top military award, "fully a third of those claims cannot be supported by military records."[35] Likewise, "[a] look at 273 obituaries published in the past decade alone found that in more than four of five cases, official records didn't support decorations for bravery attributed to the deceased."[36] When the Library of Congress compiled veterans' oral histories for its Veterans History Project, 25 of the 49 Medal of Honor recipients it identified, as well as 32 Distinguished Service Cross recipients and 14 Navy Cross recipients, apparently had not actually been awarded those decorations.[37]

Although many people lie about their military records to obtain government benefits, false claims often lead instead to more intangible, non-pecuniary advantages and honors. For example, in 2008, the House of Representatives passed a bill to name a post office after Irving Joseph Schwartz, who had

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[35] Crewdson, *supra* note 32, at 1.

[36] *Ibid.* ("[T]he *Tribune* used military records to unearth 84 bogus Medals of Honor, 119 Distinguished Service Crosses, 99 Navy Crosses, five Air Force Crosses and 96 Silver Stars.").

[37] *Half of MOH Entries in Oral History Project are Incorrect*, Marine Corps Times, Oct. 1, 2007, available at 2007 WLNR 27917486. The Library of Congress attributes at least some of the mistakes regarding the Medal of Honor to data entry problems. *Ibid.*

falsely claimed that he received a Silver Star and three Purple Hearts as a paratrooper from the 82nd Airborne Division who jumped into Normandy six days before D-Day.[38] The Air Force named a national award after retired Chief Master Sergeant Spencer B. Dukes, who had falsely claimed he received numerous medals, including the Silver Star, and survived the Bataan Death March; it rescinded the award after Dukes' lies came to light.[39] Similarly, the Boxing Writers of America established the Pat Putnam Award for perseverance in overcoming adversity—which it awarded to Muhammad Ali—in honor of well-known *Sports Illustrated* writer Pat Putnam, who falsely claimed to have received four Purple Hearts and a Navy Cross, and to have spent 17 months in a Chinese POW camp during the Korean War.[40]

In further example, Joseph A. Cafasso, who was discharged from the Army as a Private First Class after only 44 days, falsely claimed to have been a

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[38] Keith Rogers & Steve Tetreaul. *Attention Reveals Lie About WWII Record*, Las Vegas Review-Journal, Nov. 9, 2008, available at 2008 WLNR 21588206; see also H.R. 6837, 110th Cong. (Sept. 10, 2008).

[39] Associated Press, *Pentagon Sleuths Discover Bataan March Hero Lied*, Fresno Bee, Jan. 19, 1997, available at 1997 WLNR 1826684.

[40] Bernard Fernandez, *Revelations About Boxing Writer Pat Putnam*, Philadelphia Daily News, May 2, 2008, available at 2008 WLNR 8181576.

Lieutenant Colonel in the Special Forces and to have received the Silver Star; he became a military consultant for Fox News for four months (initially unpaid), providing information to reporters, producers, and on-air consultants.[11] Jesse Macbeth—who had been discharged from the Army after only a month—falsely claimed that he had been an Army Ranger who received a Purple Heart, to lend credibility to his fabricated stories about the mass murders and other war crimes he purportedly witnessed American troops committing during the liberation of Iraq.[12] Likewise, Micah Wright, who never served in the military, sold nearly 20,000 copies of his antiwar book *You Back the Attack, We'll Bomb Who We Want*, in which he falsely claimed to have been an Army Ranger.[13] Similarly, the National Educational Television Network broadcast lectures by Dan Gisel, who spoke of "his experiences as a Green Beret in Vietnam" while wearing an Army uniform bearing the Distinguished Service

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[11] Jim Rutenberg, *At Fox News, the Colonel Who Wasn't*, New York Times, Apr. 29, 2002, available at 2002 WLNR 4054043.

[12] Colin McDonald, *Iraq War "Veteran," Hero Lied About it All*, Seattle Post-Intelligencer, June 8, 2007, available at 2007 WLNR 10765581.

[13] Calvin Reed, *Seven Stories Cancels Book*, Publishers Weekly, May 10, 2004, available at 2004 WLNR 12572530. Cf. John Marshall, *Former Warrior's Art is His Weapon Now*, Seattle Post-Intelligencer, June 13, 2003, available at 2003 WLNR 2952866 ("Sometimes it takes a warrior to make a real anti-war statement. Such is the case with Micah Ian Wright, a former Army Ranger who took part in the invasion of Panama.").

Cross; Gisel was neither a Green Beret nor a Distinguished Service Cross recipient.[44]

Impersonators also have worn unearned medals, or lied about their awards and badges, at military funerals,[45] veterans' functions,[46] on Veterans' Day floats,[47] and during ceremonies to honor true military heroes. One such example is Charles T. White who, based on his false claims that he received four Purple Hearts and had been a POW for seven months during the Vietnam War, was invited to be "the keynote speaker at a ceremony honoring former prisoners of war at Naval Air Station Jacksonville."[48]

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[44] Tom Bowman, *Old Soldier Unveils Veteran Liars*, Baltimore Sun, Jan. 13, 1998, available at 1998 WLNR 1137484.

[45] John P. Martin, *A Dressing Down for a Marine Imposter*, Star Ledger, Apr. 24, 2004, available at 2004 WLNR 18066039 (discussing Walter Carlson, who apologized in court for wearing a Marine uniform with an unearned Navy Cross, Silver Star. Bronze Star, and Purple Heart to the funeral of a Marine officer who died in Iraq).

[46] Gregg Zoroya, *Frauds Put Up a Decorated Front*, USA Today, June 21, 2006, available at 2006 WLNR 10676418.

[47] Patricia C. McCarter, *Man Accused in Medals Case to Change Plea*, Huntsville Times, Apr. 9, 2010, available at 2010 WLNR 7420597.

[48] Chad Smith, *Veteran Pleads Guilty to Lying About Purple Hearts*, St. Augustine Record, Jan. 31, 2009, available at http://staugustine.com/stories/013109/news_013109_036.shtml.

In addition to the pretenders who have been caught in their lies, it is impossible to know how many others have not been exposed. It is apparent, however, that false claims concerning military medals, decorations, and badges are a widespread and troubling problem, even when they are not directly tied to pecuniary benefits. It is an affliction that "more speech" frequently cannot wholly remedy, and often is not available to remedy, particularly in a timely manner. Cf. Pet. App. 38a-39a.

In short, whether it is a person masquerading as a decorated general at a veterans' celebration,[49] or a braggart whose false claims of receiving prestigious decorations move a young neighbor to write a school essay about him entitled "The Hero Next Door,"[50] lies about military honors take advantage of the public's trust. They allow con men to benefit in innumerable tangible and intangible ways from the virtually inexhaustible reservoir of goodwill, admiration, and honor that military heroes have

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[49] Greg Moran, *Man Who Wore Unearned Medals Gets Probation*, Union Tribune, Apr. 16, 2010, available at 2010 WLNR 8028488 (discussing David Weber, who wore the uniform of a two-star general officer, two Purple Hearts, and several Legion of Merit medals at a VFW celebration of the Marine Corps' birthday).

[50] Mark Morris, *Charge Against Bogus "Hero" Could Be Dropped*, Kansas City Star, June 5, 2010, available at 2010 WLNR 11487052 (explaining that Timothy Watkins, who served for one month in the Army, admitted that his claims about receiving the Silver Star and Purple Heart were false and agreed to 18 months of pretrial supervision in a diversion agreement).

earned over the past 235 years. As Part II demonstrates, the Government has ample constitutional authority to prevent such piracy.

II. THE GOVERNMENT CONSTITUTIONALLY MAY PREVENT PEOPLE FROM WRONGFULLY TAKING ADVANTAGE OF THE GOODWILL AND PRESTIGE ASSOCIATED WITH MILITARY AWARDS THEY HAVE NOT EARNED.

At its core, this case is about theft, not lying in general. It is undisputed that the First Amendment does not protect people who falsely claim to have received military awards in order to fraudulently receive tangible or pecuniary benefits such as tax breaks, increased government benefits, or veterans' preferences or set-asides. See, *e.g.*, *United States* v. *Swisher*, 790 F. Supp. 2d 1215, 1223 (D. Idaho 2011). This Court likewise should conclude that the First Amendment does not protect those who wrongly appropriate for themselves the intangible, nonpecuniary advantages and "acclaim," Pet App. 23a, that flow from the goodwill associated with military awards they have not earned.[51] Indeed, the

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[51] Because the Act applies only to a person who "falsely represents" himself as having received a military award, 18 U.S.C. § 704(b), it covers only statements that are intended to be understood as allegedly truthful factual assertions. See *Williams* v. *United States*, 458 U.S. 279, 284 (1982) (holding that a person did not "make any representation" or "statement" by depositing a check, because "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'"); *United States* v. *Guzman*, 781 F.2d 428, 431 (5th

"[f]acial invalidation" of the Stolen Valor Act that Alvarez seeks is "manifestly[] strong medicine that has been employed by the Court sparingly and only as a last resort." *Nat'l Endowment for the Arts* v. *Finley*, 524 U.S. 569, 580 (1998) (quotation marks omitted); see also *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 451 (2008).

Under this analysis, this Court need not resolve the sweeping question, posed by the parties and courts below, of whether lies are presumptively excluded from First Amendment protection. Cf. Pet. App. 3a (analogizing Alvarez's false statements about receiving the Medal of Honor to "lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke"); see also Pet. App. 109a-110a (Kozinski, C.J., concurring in denial of rehearing *en banc*). As Section A explains, the First Amendment unambiguously permits the Government to prevent third parties from wrongfully attempting to claim for themselves, or potentially benefit in any way from, the goodwill associated with military awards, because the Government created

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Cir. 1986) (*per curiam*) ("A false representation is one that is incorrect and untrue and is made with an intent to deceive or mislead."); see also *Milkovich* v. *Lorain J. Co.*, 497 U.S. 1, 26 (1990) (holding that statements of "hyperbole" are "not understood as actual assertions of fact") (Brennan, J., dissenting). Thus, despite the concerns of the panel below, Pet App. at 31a-32a, the Act does not cover satire, parody, hyperbole, statements by actors, and the like that do not constitute "false[] represent[ations]."

them, endowed them with meaning, and has issued them selectively over the course of centuries in accordance with exacting requirements, and the members of the Armed Forces have consecrated such awards through their courage, dedication, and sacrifice. *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522, 533 (1987). Section B demonstrates that the Government's interest in preventing third parties from wrongfully appropriating the goodwill associated with military awards is distinct from its asserted interest in preserving their value or meaning, which this Court has questioned in other contexts. And Section C shows that this same conclusion follows from the Government's well-established authority to prevent the *wearing* of unearned military decorations.

A. Under *U.S. Olympic Committee*, Third Parties Do Not Have a Constitutional Right to Reap the Advantages of the Goodwill and Prestige That, As a Result of the Government's Efforts, Have Become Associated With Military Awards.

The First Amendment does not impede the Government from restricting speech in order to prevent third parties from potentially benefiting, or attempting to benefit, from the goodwill associated with the intellectual property of others, including trademarks, service marks, collective marks, and certification marks, as well as certain other terms and symbols specially designated by Congress. Some

courts have gone so far as to declare these types of restrictions to be content-neutral. See, *e.g.*, *Dr. Seuss Enters., L.P.* v. *Penguin Books, USA, Inc.*, 109 F.3d 1394, 1397 n.1 (9th Cir. 1997); *Dallas Cowboy Cheerleaders, Inc.* v. *Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979).

Courts have enforced such restrictions even where a person was attempting to use someone else's intellectual property in order to facilitate political speech, which enjoys the highest level of First Amendment protection. See, *e.g.*, *Coca-Cola Co.* v. *Purdy*, 382 F.3d 774, 788 (8th Cir. 2004) (holding that the First Amendment does not "protect[] [the defendant's] appropriation of plaintiff's marks in order to spread his protest message"); *United We Stand Am., Inc.* v. *United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 93 (2d Cir. 1997) ("Even assuming that [the defendant] might communicate its political message more effectively by appropriating [the plaintiff's] Mark, such appropriation * * * * * is not protected by the First Amendment."). Courts likewise have enforced such restrictions where the intellectual property at issue was the name of a church—a non-commercial issue squarely at the heart of the First Amendment. See, *e.g.*, *Gen. Conf. Corp. of Seventh-Day Adventists* v. *McGill*, 617 F.3d 402, 414-16 (6th Cir. 2010) (enforcing trademark rights in "Seventh-day Adventist"); *TE-TE-MA Truth Found.* v. *World Church of Creator*, 297 F.3d 662, 665 (7th Cir. 2002) (enforcing trademark rights in "Church of the Creator").

1. In *U.S. Olympic Committee*, 483 U.S. at 533, this Court upheld the constitutionality of the Amateur Sport Act of 1978, Pub. L. No. 95-506, 92 Stat. 3045 (Nov. 8, 1978), *formerly codified at* 36 U.S.C. § 380. Section (c) of the Act declared that the U.S. Olympic Committee ("USOC") "shall have exclusive right to use * * * the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination thereof." *Id.* at 526 n.4, quoting 36 U.S.C. § 380; see also *id.* at 530 ("Congress intended to provide the USOC with exclusive control of the use of the word 'Olympic' without regard to whether an unauthorized use of the word tends to cause confusion."). Section (a) further provided that a person could not, among other things, use those terms "to promote any theatrical exhibition, athletic performance, or competition," regardless of whether such use was commercial. *Id.* at 528, quoting 36 U.S.C. § 380(a).

This broad prohibition, like the Stolen Valor Act, went even further than traditional federal intellectual property protections. See 483 U.S. at 531. The Court nevertheless held that these restrictions were permissible in part because "Congress reasonably could conclude that the commercial and promotional value of the word 'Olympic' was the product of the USOC's 'own talents and energy, the end result of much time, effort, and expense.'" *U.S. Olympic Comm.*, 483 U.S. at 532-33, quoting *Zacchini* v. *Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977). It later reiterated, "Because Congress reasonably could conclude that the USOC

has distinguished the word 'Olympic' through its own efforts, Congress' decision to grant the USOC a limited property right in the word 'Olympic' falls within the scope of trademark law protections, and thus certainly within constitutional bounds." *Id.* at 534-35; see also *FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193, 198 (1946) (recognizing Congress' authority to prevent a person from adopting or using "words or symbols" to "creat[e] the impression that [his] products were sponsored by or otherwise carried the imprimatur of the Red Cross"). The Court expressly recognized that such protections could be either civil or criminal. See *U.S. Olympic Comm.*, 483 U.S. at 532 n.8; see also *Garrison* v. *Louisiana*, 379 U.S. 64, 67 & n.3 (1964) (treating civil and criminal libel comparably for First Amendment purposes).

The Court went on to reject the argument that the plaintiff had a First Amendment right to use the term "Olympic" because it wished to do so for a non-commercial purpose, to "make a political statement about the status of homosexuals in society." *U.S. Olympic Comm.*, 483 U.S. at 535. The Court noted that the plaintiff's "expressive use of the word cannot be divorced from the value the USOC's efforts have given to it," *id.* at 541, and that the plaintiff's "proposed use of the word 'Olympic' was a clear attempt to exploit the imagery and goodwill created by the USOC," *id.* at 541 n.19. The Court concluded, "The mere fact that the [plaintiff] claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to 'appropriat[e] to itself the harvest of those who have

sown.'" *Id.* at 541, quoting *Int'l News Serv.* v. *Assoc. Press*, 248 U.S. 215, 239-40 (1918).

Thus, this Court in *U.S. Olympic Committee* squarely recognized that Congress may, consistent with the First Amendment, prohibit a third party from associating itself with, or taking advantage of the goodwill associated with, certain symbols that have acquired their value and goodwill primarily through the efforts of others. Such a prohibition may validly be applied even if that third party is engaged in a non-commercial activity or attempting to express a political message that, in all other respects, is protected by the First Amendment. *U.S. Olympic Comm.*, 483 U.S. at 532-35, 541; *Coca-Cola Co.*, 382 F.3d at 788; *United We Stand Am.*, 128 F.3d at 93.[52]

2. The principles of *U.S. Olympic Committee* should govern here. Indeed, those principles highlight the Ninth Circuit's error in focusing

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[52] This principle defeats Alvarez's claim that the Stolen Valor Act is unconstitutional as applied to him, because his lie about receiving the Medal of Honor purportedly concerned his qualifications for public office. An otherwise valid prohibition on knowingly false statements need not contain an exception to permit knowingly false statements of fact in the political context. *Harte-Hanks Comms., Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989) (affirming libel verdict against a newspaper for its false statements about a candidate for municipal judge made with "actual malice"); *Garrison*, 379 U.S. at 75 ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government.").

primarily on whether false claims about receiving military awards "cause damage to the [awards'] reputation and meaning." Pet. App. 23a. As that court itself recognized, "the most obvious reason people lie about receiving military honors is because they believe that their being perceived as recipients of such honors brings them acclaim." *Ibid.* Alvarez's attorney admitted that Alvarez lied "to try to make himself look good in the eyes of his constituents and colleagues."[33] And the district court found that Alvarez's claims about receiving the Medal of Honor "appear[] to be merely a lie intended to impress others present at the meeting." *Id.* at 143a.

Here, as in *U.S. Olympic Committee*, the value and goodwill associated with military awards is "'the end result of much time, effort, and expense'"—by both the Government itself, as well as those serving in its military forces. *U.S. Olympic Comm.*, 483 U.S. at 532-33, quoting *Zacchini*, 433 U.S. at 575. The meaning of each award was established by the Government,[34] the awards' value has been

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[33] Defendant's Position Re: Sentencing, Dist. Ct. Dock. #35, at 4 (July 7, 2008).

[34] *E.g.*, 10 U.S.C. §§ 3741, 6241, 8741 (providing that the Medal of Honor may be awarded only to a person who "distinguishes himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty" in combat operations); *id.* §§ 3742, 6242, 8742 (providing that a person may be awarded a service cross if he "distinguishes himself by extraordinary heroism not justifying the award of a medal of honor" in combat operations); *id.* § 1129 (establishing criteria for Purple Heart).

maintained by the Government's selectivity in awarding them,[55] and their esteem in the eyes of the public has been cultivated over the years through the service and achievements of the military personnel—the Government's agents—who earned them. Such awards are impressive because of the efforts of heroes such as Lance Corporal Reichenthal, *supra* at 1, Staff Sergeant Miller, *supra* at 11-12, and Justice Byron White, who earned two Bronze Stars from the Navy.[56] The Stolen Valor Act's narrow prohibition is a valid exercise of Congress' authority to prevent third parties from wrongfully taking advantage of that goodwill, and "'harvest[ing]'" what others have sown. *U.S. Olympic Comm.*, 483 U.S. at 541, quoting *Int'l News Serv.*, 248 U.S. at 239-40.

The Act's legislative history confirms that Congress enacted the statute in part to prevent third parties from being able to wrongfully take advantage of the goodwill that has become associated with military awards. The Act's sponsor, Senator Conrad, explained that the Act was necessary to prevent "imposters" who "claim to have medals that they have not earned" from "gain[ing] credibility in their communities." 151 Cong. Rec. S12684, S12688 (Nov.

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[55] See, *e.g.*, DoDM 1348.33; AR 600-8-22; SECNAVINST 1650.1H; AFI 36-2803; *Administrative and Issue Procedures for Decorations, Medals, and Awards*, MCO 1650.19J (Feb. 5. 2001).

[56] Joan Biskupic, *Supreme Court Jurist Was a Star On and Off the Bench*, USA Today, Apr. 15, 2002, available at 2002 WLNR 4508093.

10, 2005) (statement of Sen. Conrad); see also *id.* at S12689 (statement of Sen. Conrad) (arguing that people who "have [not] rightfully earned these awards" should not be permitted to "exploit these honors for personal gain").

Representative Salazar, who assisted in drafting the Stolen Valor Act, echoed these sentiments when he said, "In addition to diminishing the meaning, on several occasions phonies have used their stature as a decorated war hero to gain credibility that allows them to commit more serious frauds." 152 Cong. Rec. H8819, H8821 (Dec. 6, 2006) (statement of Rep. Salazar). He explained that such "phony heroes" have "become the object of national award-winning documentaries on national network television," and "flooded major publishing houses with false tales of heroism which have become best-selling biographies." *Ibid.* Representative Graves likewise declared, "[W]e cannot allow imposters to seek fame and fortune from falsehood." *Id.* at H8823 (statement of Rep. Graves); see also *id.* at H8821 (statement of Rep. Davis) (condemning those who "have displayed false symbols of service" for, among other things, "misleading our citizens").[57]

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[57] The White House press release announcing President Bush's signature of the Act characterized it as "expand[ing] criminal penalties" for "fraud relating to military decorations and medals." *Statement by the Press Secretary on Bill Signings*, 2006 WL 3737637, at *1 (Dec. 20, 2006). The committee report accompanying an amendment to the Act's predecessor likewise noted that one of the statute's purposes was to "protect[] against fraud." *P.L. No. 103-442, Crimes Relating to Congressional Medals of Honor*, H.R. Rep. No. 103-786 (Oct. 3,

In short, notwithstanding the congressional findings accompanying the Act, it should not be viewed exclusively as a means of attempting "to protect the reputation and meaning" of military awards, Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (Dec. 20, 2006), a main issue on which the arguments and opinions below focused, see, *e.g.*, Pet. App. 35a, 37a,

3. Although the Stolen Valor Act, like the Amateur Sports Act, goes beyond the scope of traditional intellectual property laws, a rough analogy may be made to certification marks. A "certification mark" is a "seal of approval" of the "quality" or "some other characteristic" of the goods or services of someone other than the mark's owner. 3 Callmann, Unfair Competition, Trademarks & Monopolies, § 17.18 (4th ed. 2009); see also 15 U.S.C. § 1127. Certification marks are "generally treated the same as trademarks." *Levy* v. *Kosher Overseers Ass'n of America, Inc.*, 104 F.3d 38, 39 (2d Cir. 1997). The creator of a certification mark, such as the "Good Housekeeping Seal of Approval," may stop third parties, whose products or services do not satisfy the requirements for the mark, from deriving the benefits that flow from using it. See, *e.g.*, *Jos. S. Cohen & Sons Co.* v. *Hearst Mags.*, 220 F.2d 763, 766 (C.C.P.A. 1955); see also *United States* v. *4500 Audek Model No. 5601 AM/FM Clock Radios*, 220 F.3d 539 (7th Cir. 2000).

1994): accord 140 Cong. Rec. H10476, H10476 (Oct. 3, 1994) (statement of Rep. Brooks); *id.* (statement of Rep. Fish).

So too with a military award: although bestowed directly upon a person, rather than his or her goods or services, such an award functions as an official "seal of approval," certifying the recipient's valor, dedication, or achievements. Although the Stolen Valor Act prohibits a broader range of false statements about military awards than does the Lanham Act regarding certification marks, see 15 U.S.C. §§ 1114, 1118, 1124, 1125, the net interference with expression—a prohibition on falsely claiming a certification one has not earned—is essentially the same, and constitutionally permissible under *U.S. Olympic Committee*, 483 U.S. at 532-35, 541. Thus, this Court should affirm Congress' reasonable attempt to prevent third parties from enjoying the "acclaim," Pet. App. 23a, and goodwill associated with military awards that accrued through the efforts of the Government and members of its Armed Forces.

B. The Government's Interest in Preventing Third Parties From Wrongfully Taking Advantage of the Goodwill Associated With Military Awards Differs From Its Asserted Interest in Preventing People From Disrespecting Symbols Such as the Flag.

This Court's precedents invalidating prohibitions on flag burning, *United States* v. *Eichman*, 496 U.S. 310 (1990); *Texas* v. *Johnson*, 491 U.S. 397 (1989), do not require invalidation of the Stolen Valor Act. In *Johnson*, 491 U.S. at 410, the State of Texas

attempted to defend its flag-burning statute, which prohibited a person from damaging the flag in a way likely to cause serious offense, by arguing that the measure was necessary to "preserv[e] the flag as a symbol of nationhood and national unity." This Court rejected that argument, declaring that the Government may not "compel conduct that would evince respect for the flag," *id.* at 414, or "ensure that a symbol [is] used to express only one view of that symbol or its referents," *id.* at 417; see also *Eichman*, 496 U.S. at 319.

This case, however, is not primarily about undermining the meaning and value of symbols, but rather misappropriating and wrongfully taking advantage of the meaning and value they have acquired through the longstanding efforts of others. The Act does not prohibit false statements about military awards on the grounds that such assertions contain unpopular, offensive, or disrespectful ideas, cf. *Johnson*, 491 U.S. at 414, but rather because they improperly allow imposters to enjoy "acclaim," Pet. App. 23, to which they are not entitled. *Johnson* and its progeny thus do not bar the Government from attempting to prevent third parties from wrongfully appropriating for themselves such undeserved intangible and nonpecuniary benefits.

C. The Government's Ability to Prohibit People From Falsely Claiming to Have Received Military Awards Is Confirmed By Its Recognized Authority to Bar People From Wearing, With Intent to Deceive, Military Awards They Have Not Earned.

Another reason the Stolen Valor Act is constitutional—and decisions like *Johnson* are inapt—is because Congress may undoubtedly prohibit people from wearing, with the intent to deceive, military awards they have not earned, see 18 U.S.C. § 704(a),[58] and that ban on expressive conduct is the constitutional equivalent of the Act's prohibition on false statements concerning the receipt of military awards, see *id.* § 704(b). The earliest prohibition on the unauthorized wearing of military awards dates back to the Revolutionary War. Immediately after directing the creation of "Honorary Badges of distinction" for "veteran Non-Commissioned officers and soldiers of the army who have served for more than three years with bravery, fidelity and good conduct," General George Washington ordered, "[S]hould any who are not entitled to these honors have the insolence to assume the badges of them they shall be severely

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[58] Courts have inferred both a scienter and an "intent to deceive" requirement in 18 U.S.C. § 704(a) to help ensure its constitutionality. See, *e.g.*, *United States* v. *Perelman*, 658 F.3d 1134, 1137-38 (9th Cir. 2011); *United States* v. *Robbins*, 759 F. Supp. 2d 815, 818 (W.D. Va. 2011).

punished."[59] Such conduct has been legislatively proscribed for nearly a century. See, *e.g.*, Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286, *formerly codified at* 10 U.S.C. § 1425; Act of April 21, 1928, ch. 392, 45 Stat. 437, *formerly codified at* 10 U.S.C. § 1425.

In *Schacht* v. *United States*, 398 U.S. 58, 61 (1970), citing *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), a First Amendment case, this Court opened its analysis by declaring that "18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face."[60] If the unauthorized wearing of a military uniform—even without an attempt to exercise official authority, claim any special rights or privileges, or defraud anyone—constitutionally may be prohibited, there can be little doubt that the unauthorized wearing of military awards by people who have not earned them likewise may be proscribed. See also *Smith* v. *Goguen*, 415 U.S. 566, 596 (1974) (Rehnquist, J., dissenting) (attributing "significance" to the fact that the statute "prohibit[ing] the unauthorized wearing of service medals * * * h[as] never been judicially

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[59] Washington, *supra* note 14.

[60] A separate statute allowed actors to wear military uniforms in theatrical performances only "if the portrayal d[id] not tend to discredit" the military. *Schacht*, 398 U.S. at 59-60, *quoting* 18 U.S.C. § 772(f). The *Schacht* Court invalidated that limitation on the theatrical performance exception, ruling that it constituted impermissible viewpoint discrimination. *Id.* at 63.

construed or even challenged"), citing 18 U.S.C. § 704(a).[61]

Wearing a military award with the intent to deceive, in turn, must be regarded as the constitutional equivalent of falsely *claiming* to have received that award. To be sure, several courts have resisted this conclusion, holding that wearing an award is "conduct" that is not entitled to full First Amendment protection. See, *e.g.*, *Perelman*, 658 F.3d at 1139-40. This Court's precedents, however, make clear that the First Amendment protects not only pure speech, but also expressive conduct, in which "'speech' and 'nonspeech' elements are combined in the same course of action." *O'Brien*, 391 U.S. at 376.

For example, in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943), this Court recognized that the use of "[s]ymbolism," including "emblem[s]," is "a primitive but effective way of communicating ideas" and "a short cut from mind to mind." See, *e.g.*, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995) (holding that "walking * * * in [a] uniform displaying [a] swastika * * * constitutes expressive conduct"); *Tinker* v. *Des Moines Indep. Comm. Sch. Dist.*, 393

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[61] Numerous military courts likewise have upheld convictions under Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, for wearing unauthorized military awards, albeit without considering any First Amendment concerns. See, *e.g.*, *United States* v. *Armon*, 51 M.J. 83 (C.A.A.F. 1999); *United States* v. *Zander*, 46 M.J. 558 (N.-M. Ct. Crim. App. 1997).

U.S. 503, 505 (1969) ("[T]he wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause."). A restriction on expressive conduct that is aimed at the communicative component of that conduct is treated the same as a restriction on pure speech. *Johnson*, 491 U.S. at 406 ("A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.") (quotation marks omitted); see also *O'Brien*, 391 U.S. at 377, 382.

Under this Court's precedents, wearing military awards with the intent to deceive others must be considered expressive conduct, because it conveys a message—that the actor has received the awards at issue. Moreover, § 704(a), which prohibits a person from wearing unearned military awards, is aimed at that communicative component of the conduct; it does not appear that the Government has any interest in restricting such wear apart from the false message it conveys about the actor (which, in turn, may undermine the awards' meaning or lead to undeserved benefits for the actor). Cf. *Robbins*, 759 F. Supp. 2d at 822; *Perelman*, 658 F.3d at 1138-39.

Because § 704(a)'s prohibition on the false wearing of military awards is constitutionally permissible, see *Schacht*, 398 U.S. at 61, § 704(b)'s ban on falsely claiming, through pure speech, to have received those awards must be upheld, as well. Conversely, affirming the panel's ruling would call

into question the constitutionality of § 704(a)'s prohibition on the unauthorized wearing of military medals—an implausible result that further undermines the panel's ruling. Thus, Congress's decision to punish those who falsely claim to have received military honors was entirely consistent with the First Amendment.

CONCLUSION

For the foregoing reasons, the Stolen Valor Act is constitutional, both facially and as applied to Alvarez. This Court should reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit and reinstate Alvarez's conviction.

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APPENDIX – LIST OF *AMICI*

The 25 *amici* submitting this brief share a strong interest in preserving the meaning and integrity of military decorations, medals, and badges, and preventing pretenders from appropriating for themselves, and enjoying the benefits of, the tremendous goodwill and prestige associated with those awards.

The *Veterans of Foreign Wars of the United States* ("VFW") is a congressionally chartered veterans service organization, dating back to 1899, of more than 1.5 million veterans who have served overseas in war zones or areas demanding arduous duty. The VFW's four main objectives are preserving and extending veterans' rights, advocating a strong national defense, promoting patriotism, and serving local communities. It lobbies Congress on behalf of veterans, monitors care and seeks assistance for veterans, examines overseas troop deployments and the Pentagon's budget, offers educational programs for schoolchildren, and provides assistance for the families of deployed troops. See http://www.vfw.org.

AMVETS is a congressionally chartered veterans service organization with a proud history of assisting veterans and sponsoring programs that serve the United States and its citizens. Membership is open to anyone who is currently serving, or who has honorably served, in the U.S. Armed Forces. AMVETS maintains a network of national service offices accredited by the Department of Veterans

Affairs to provide advice and action on veterans' compensation claims at no charge to the veteran. It also lobbies Congress on behalf of veterans, provides companionship to hospitalized and disabled veterans, supports community programs, and sponsors a carillon program to honor deceased servicemen and women. See http://www.amvets.org.

The *Disabled American Veterans* ("DAV") is a 1.2 million-member, congressionally chartered, 501(c)(4) non-profit organization dedicated to building better lives for America's disabled veterans and their families. The DAV represents more than 200,000 veterans and their dependents with claims for benefits from the Department of Veterans Affairs and Department of Defense. It also operates a comprehensive network of volunteers who provide veterans free rides to and from veterans' medical facilities and help improve care and morale for sick and disabled veterans. Its members also provide grassroots advocacy and services nationwide, including educating lawmakers and the public about issues relevant to disabled veterans and lobbying on behalf of legislation to help them. See http://www.dav.org.

The *Jewish War Veterans of the United States* ("JWV") was founded in 1896 to combat bigotry and anti-Semitism, particularly as they affect Jewish members of the armed forces and veterans; assist veterans and their families in obtaining benefits;

foster veterans' education; and help maintain the graves of our nation's heroic dead. See http://www.jwv.org.

The *Military Order of the World Wars* ("MOWW") is a congressionally chartered nonpartisan organization established in 1919 to promote the nation's welfare; preserve the memories of the World Wars; inculcate love of country and flag; defend the integrity and supremacy of the federal government and the U.S. Constitution; and encourage and assist in the holding of commemorations and the establishment of memorials of the world wars. The MOWW is open to all officers of the federal uniformed services. See http://www.militaryorder.net.

The *Vietnam Veterans of America* ("VVA") is a congressionally chartered, non-profit organization that is exclusively dedicated to Vietnam-era veterans and their families. It aims to promote and support the full range of issues important to Vietnam veterans, create a new identity for this generation of veterans, and change public perception of Vietnam veterans. *See* http://www.vva.org.

The *Military Officers Association of America* ("MOAA") is the nation's largest association of military officers, founded in 1929, with 370,000 members from all branches of service. It is an independent, nonprofit, politically nonpartisan organization dedicated to maintaining a strong national defense that plays an active role in

proposed legislation affecting the career force, the retired community, and veterans of the uniformed services. The MOAA also offers career transition assistance, military benefits counseling, educational assistance to children of military families, and strong involvement in military professionalism activities. See http://www.moaa.org.

The *Non Commissioned Officers Association of the United States of America* ("NCOA") was established in 1960 and congressionally chartered in 1988 to enhance and maintain the quality of life for noncommissioned and petty officers in all branches of the Armed Forces, including the National Guard and Reserves. The NCOA offers a wide range of benefits and services designed especially for enlisted service members and their families. See http://www.ncoausa.org.

The *National Association for Uniformed Services* ("NAUS") was founded in 1968 to protect and enhance the earned benefits of uniformed servicemembers, retirees, veterans, and their families and survivors, while maintaining a strong defense. It also seeks to foster *esprit de corps* among uniformed services personnel and veterans of the United States, through nonpartisan advocacy on Capitol Hill and with other government officials. See http://www.naus.org.

The *Association of the United States Army* ("AUSA"), founded in 1950, is a private, non-profit educational organization that supports America's

Army. It represents every American Soldier by being the voice for all components of America's Army, fostering public support of the Army's role in national security, and providing professional education and information programs. It also provides recreational and educational opportunities to Soldiers and their families worldwide. See http://www.ausa.org.

The *Association of the United States Navy* ("AUSN"), founded in 1955, promotes the interests of Navy service members and their families by writing to the President, hosting House and Senate meetings, working with key Members of Congress, and encouraging members to support key legislation. Comprised of over 20,000 members, the AUSN also encourages the professional development of officers and enlisted personnel, and educates the public and government officials regarding the nation's welfare and security. See http://www.ausn.org.

The *Air Force Association* ("AFA") is an independent, nonprofit, civilian education organization promoting public understanding of aerospace power and the pivotal role it plays in the security of the nation. The AFA advocates aerospace power and a strong national defense, and supports the United States Air Force, the Air Force family, and aerospace education. It conducts national symposia, disseminates information through outreach programs, sponsors professional development seminars, and presents national awards and scholarships. See http://www.afa.org.

The *Marine Corps League* (the "League") is a 501(c)(4) nonprofit organization, founded in 1923 and chartered by Congress in 1937. With more than 76,000 members, the League perpetuates the traditions of the Marine Corps; renders assistance to Marines, as well as their widows and orphans; and provides volunteer assistance at veterans hospitals. The League also assists veterans in obtaining benefits; sponsors the Young Marines, a physical fitness program, and scholarships for youths; and represents the interests of Marines before Congress concerning military readiness, benefits, and entitlements. See http://www.mcleague.com.

The *Air Force Women Officers Associated* ("AFWOA") is a non-profit, tax-exempt veterans' organization that was formed in 1975 and has over 1,000 members, including active duty, separated, and retired female officers of the Regular Air Force and the Reserve Component. AFWOA fosters comradeship through reunions, maintains ties between active and retired women officers, preserves the history and promotes recognition of the role of military women, and lends support to women engaged in education and training programs. See http://www.afwoa.org.

The *Reserve Officers Association* ("ROA") is a 60,000-plus member professional association for all uniformed services of the United States. Created in 1922 and chartered by Congress in 1950, the ROA supports and promotes the development and execution of a military policy for the United States

that will provide adequate national security. It provides professional development workshops, mentoring programs, and a career center to meet the unique needs of military Reservists. It advocates for equipment, training, recruitment, and retention incentives, and employment rights for the Reserve Components, and offers expert legal information on various federal statutes of particular importance to Reservists. See http://www.roa.org.

The *Army Reserve Association* ("ARA") is a private, non-profit educational organization formed in 1993 that supports America's Army as well as members of the U.S. Army Reserves of all ranks. The ARA represents the interests of both the Army Reserve Component and its members before Congress, the Department of Defense, and the Department of the Army. See http://www.armyreserve.org.

The *Fleet Reserve Association* ("FRA") is a congressionally chartered, non-profit organization that represents the interests of the Sea Service community before Congress. The FRA lobbies Congress on behalf of Sea Service Personnel, presents legislative seminars about key bills on Capitol Hill, and sponsors patriotism essay awards and scholarships. See http://www.fra.org.

The *National Guard Association of the United States* ("NGAUS"), created in 1878, includes nearly 45,000 current and former Guard officers and provides unified Guard representation in

Washington, D.C. It lobbies Congress and the Executive Branch to obtain modern equipment, training, missions, and personnel benefits for the Army and Air National Guard. See http://www.ngaus.org.

The *Military Order of the Purple Heart* ("MOPH"), chartered by Congress in 1958, is a nonprofit organization comprised of military men and women who received the Purple Heart for wounds suffered in combat. It is the only veterans service organization comprised exclusively of combat veterans. The MOPH promotes awareness of, and respect for, the Purple Heart; offers assistance to all veterans in matters involving the Department of Veterans Affairs; and provides volunteers for veterans hospitals, as well as funds for the welfare or rehabilitation of wounded and disabled veterans. See http://www.purpleheart.org.

The *Distinguished Flying Cross Society* is a 501(c)(19) nonprofit organization, founded in 1994, dedicated to the preservation, perpetuation, and publication of the history of the Distinguished Flying Cross, as well as the heritage and traditions of the men and women, from all military services worldwide, who have been awarded the Distinguished Flying Cross "as a result of deeds accomplished during aerial flight." See http://www.dfcsociety.org.

The *Special Forces Association* serves as the voice of the Special Forces community, perpetuates

Special Forces traditions and brotherhood, advances the public image of Special Forces, and promotes the general welfare of the Special Forces community. See http://www.specialforcesassociation.org.

The *U.S. Army Ranger Association, Inc.* is a § 501(c)(19) tax-exempt organization dedicated to promoting and preserving the heritage, spirit, image, and service of U.S. Army Rangers. It participates in many Ranger community causes such as the Ranger Memorial Foundation, Ranger Hall of Fame and Best Ranger Competition; provides scholarships to Rangers' dependents; and offers emergency financial assistance to Rangers and families of deceased Rangers. See http://www.ranger.org.

The *Flag and General Officers' Network* ("TFGON") is a § 501(c)(19) network and forum for over 3,100 Active Duty, Reserve, Guard, and Retired Flag and General Officers from every Armed Service. TFGON supports veteran memorial ceremonies and observations, as well as widows and orphans of fellow war veterans. See http://flagandgeneralofficersnetwork.org.

The *West Point Association of Graduates* ("WPAOG") is the Alumni Association for the United States Military Academy ("USMA"). It serves West Point and its graduates by furthering the ideals and promoting the welfare of the USMA. The WPAOG was founded in 1869 to reunite Academy graduates who found themselves on opposing sides during the American Civil War. Today, it continues to

strengthen the bonds of the "Long Gray Line" through communications and services to graduates, Classes, and Societies, as well as building relationships with current West Point Cadets. See http://www.westpointaog.org.

The *Association of Graduates, U.S. Air Force Academy* is the alumni association of the U.S. Air Force Academy. It is a § 501 (c)(3) non-profit organization dedicated to serving its graduates and members, enhancing the heritage of the U.S. Air Force Academy, and enriching the cadet experience by funding programs not supported by appropriated funds. It helps chronicle and publicize graduates' accomplishments, creates programs and services to support and foster camaraderie among graduates, and assists the Academy in producing great leaders for the Air Force. It also acts as a liaison between the Academy's leadership and graduates. See http://www.usafa.org.

AMICUS CURIAE BRIEF

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UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER ALVAREZ,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PROFESSORS EUGENE VOLOKH AND JAMES WEINSTEIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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I

QUESTION PRESENTED

Section 704(b) of Title 18, United States Code, makes it a crime when anyone "falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

The question presented is whether 18 U.S.C. § 704(b) is facially invalid under the Free Speech Clause of the First Amendment.

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INTEREST OF *AMICI CURIAE*[1]

Professors Eugene Volokh (UCLA School of Law) and James Weinstein (Sandra Day O'Connor College of Law at Arizona State University) have taught First Amendment law for many years, and have written about it extensively, with a special focus on the development of practically workable free speech doctrine.

In this brief, they attempt to identify the practical consequences for free speech doctrine that might arise from various approaches available to this Court in deciding this case—consequences that they expect the parties will likely not discuss in detail. While *amici* think the Stolen Valor Act is facially constitutional when properly construed, and is also constitutional as applied to respondent Alvarez's speech, their main concern is for the coherent development of First Amendment law.

SUMMARY OF ARGUMENT

Consistent with this Court's repeated observation that "there is no constitutional value in false statements of fact," *Gertz* v. *Robert Welch, Inc.*, 418

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief, except that the printing and filing costs for the brief were reimbursed from the *amici*'s university faculty support accounts. All counsel of record received notice of *amici*'s intention to file an amicus brief at least ten days before the filing date, and have consented to this filing in letters that have been lodged with the Clerk of the Court.

U.S. 323, 340 (1974), various state and federal laws restrict a wide range of knowingly false statements, and not just the familiar categories of defamation, fraudulent solicitation of money, and perjury. Most of these laws are broadly accepted as constitutional, and we expect that this Court will believe that the laws should indeed be upheld.

The best way to do so would be for this Court to (1) treat knowing falsehoods as a categorical exception to First Amendment protection, while (2) recognizing some limitations to this rule (for instance, with regard to statements about the government, science, and history) in order to avoid an undue chilling effect on true factual statements, statements of opinion, or other constitutionally valuable expression. Recognizing such a general First Amendment exception for knowing falsehoods will avoid a proliferation of First Amendment exceptions, and of cases upholding content-based speech restrictions under strict scrutiny—developments that would threaten the coherence of free speech doctrine and dangerously dilute the protection currently provided to valuable speech by the strict scrutiny test.

ARGUMENT

I. State and Federal Laws Criminalize or Impose Civil Liability for Many Categories of Knowingly False Statements

We begin by outlining some of the ways that the law punishes knowing falsehoods—restrictions that are generally seen by courts as not violating the First Amendment.

We use the term "knowing falsehoods" in this brief as shorthand for false statements of fact that the speaker knows are false, and that are reasonably perceived as factual assertions. We exclude from this category statements that are likely to be understood as fiction, humor, parody, or hyperbole. *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 57 (1988), rather than as false statements of fact. To our knowledge, the laws we discuss likewise exclude such statements, and we believe the Stolen Valor Act, properly interpreted, does so as well. See *United States* v. *Perelman*, 658 F.3d 1134, 1138 (9th Cir. 2011) (holding that the provision of the Stolen Valor Act that bears the unauthorized wearing of medals, 18 U.S.C. § 704(a), should be interpreted as limited to situations where the wearer "has an intent to deceive").

We do not discuss how the law should treat statements that result from an honest mistake, whether negligent or without fault, on the speaker's part; most of the laws described below do not cover such innocently mistaken statements. We also do not specifically discuss recklessly false statements, though we note that recklessly false statements are generally treated similarly to knowingly false statements under this Court's "actual malice" standard, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Here then is a partial list of the categories of knowing falsehoods that are restricted, largely uncontroversially:

1. *Defamatory falsehoods*, which is to say knowing falsehoods that injure an individual's reputation.

New York Times Co. v. *Sullivan* (holding that such speech is generally unprotected).

2. *Perjury*, false statements under oath in government proceedings. *Konigsberg* v. *State Bar*, 366 U.S. 36, 49 n.10 (1961) (stating that such speech is constitutionally unprotected).

3. *Fraudulent attempts to obtain money*, including within otherwise fully protected speech—such as charitable solicitation—and not merely within the less protected category of "commercial speech." *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600 (2003) (holding that such speech is constitutionally unprotected).

4. Speech actionable under the *false light tort*, which covers even nondefamatory but offensive knowingly false statements about another person. *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1974) (holding that this cause of action is constitutionally permissible); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (likewise). In some states, this tort is limited to speech that is both knowingly false and "[a]n unwarranted and/or wrongful intrusion * * * [into plaintiff's] private or personal affairs with which the public had no legitimate concern," *Cantrell*, 419 U.S. at 250 n.3. But in other states the tort has no such limitation, and extends even to statements about a person that do not deal with matters that are normally confidential or embarrassing, *e.g.*, *Hill*, 385 U.S. at 385, 390, though sometimes with the limitation that the falsehood be "highly offensive" to a reasonable person, Restatement (Second) of Torts § 652E.

5. *Intentional infliction of severe emotional distress through knowing falsehoods*, even in the absence of defamation or invasion of privacy. See *Hustler*, 485 U.S. at 56 (allowing recovery in such cases). The classic example of such an actionable statement is knowingly falsely telling someone that his or her spouse "has been badly injured in an accident," Restatement (Second) of Torts § 46 ill. 1.

6. *Trade libel*, at least when limited to knowingly false statements disparaging a product (even outside the special context of commercial advertising), and the related tort of *slander of title*, at least when limited to knowingly false statements denying a person's ownership of property. *Unelko Corp.* v. *Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (holding that the trade libel tort is constitutional, so long as "actual malice" is shown); *SCO Group, Inc.* v. *Novell, Inc.*, 692 F. Supp. 2d 1287, 1296 (D. Utah 2010) (likewise as to slander of title). This is so even though trade libel does not injure the individual dignitary interests that have long justified defamation law, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (quoting with approval *Rosenblatt* v. *Baer*, 383 U.S. 75, 92-93 (1966) (Stewart, J., concurring)).

7. *Unsworn knowingly false statements to government officials*, punishable under laws such as 18 U.S.C. § 1001 and state and federal laws prohibiting obstruction of justice or the making of false police reports. *E.g.*, *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982) (upholding the constitutionality of § 1001); *United States* v. *Konstantakakos*, 121 Fed. Appx. 902, 905 (2d Cir. 2005) (noting that "deliberate falsehoods enjoy no First Amendment protection," in the context of

a prosecution for knowingly false statements on an immigration application); *People* v. *Hanifin*, 77 A.D.3d 1181 (N.Y. App. Div. 2010) (rejecting First Amendment challenge to defendant's conviction for calling 911 to falsely claim that "he had gasoline and was going to set himself of fire"); *State* v. *Bailey*, 644 N.E.2d 314 (Ohio 1994) (holding that lying to a police officer in order to interfere with the officer's attempt to apprehend defendant's brother was obstruction of justice); *Howell* v. *State*, 921 N.E.2d 503 (Ind. Ct. App. 2009) (holding that falsely representing one's identity in sending e-mails aimed at deceiving a police officer during an investigation was obstruction of justice). This likely includes knowingly false crime reports made to the public in general, if they seem certain to come to the attention of law enforcement officials. *Haley* v. *State*, 712 S.E.2d 838 (Ga. 2011) (rejecting First Amendment challenge to defendant's conviction when defendant released YouTube videos claiming to be a serial killer and was then prosecuted for making a false statement on a matter within the jurisdiction of a state agency).

8. *Knowing falsehoods likely to provoke public panic.* *Schenck* v. *United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); 47 C.F.R. § 73.1217 (banning knowingly false statements on broadcast radio or television that foreseeably cause "direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties"); 18 U.S.C. § 1038(a)(1) (banning knowingly false statements claiming. among other

things, that an attack involving weapons of mass destruction "has taken, is taking, or will take place"): *United States* v. *Brahm*, 520 F. Supp. 2d 619, 626-27 (D.N.J. 2007) (citing *Schenck* in upholding 18 U.S.C. § 1038(a)(1) against a constitutional challenge, in a case in which defendant posted a message on a Web site stating that the following month "there will be seven 'dirty' explosive devices detonated in seven different U.S. cities: Miami, New York City, Atlanta, Seattle, Houston, Oakland, and Cleveland. The death toll will approach 100,000 from the initial blast and countless other fatalities will later occur as a result from radio[a]ctive fallout.").

9. *Knowingly falsely representing oneself as a government official and acting in that capacity*, even when this does not involve fraudulently depriving anyone of money or property. Thus, for instance, the federal statute barring impersonation of federal officials, 18 U.S.C. § 912, has been read to require only "that the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943). "[A] person may be defrauded although he parts with something of no measurable value at all." *Id.* at 705.

Accordingly, this Court in *Lepowitch* upheld a conviction under a former version of 18 U.S.C. § 912 for defendant's pretending to be an FBI agent and thereby causing someone to yield information about another person's whereabouts. The Eight Circuit upheld a § 912 conviction for defendant's pretending to be an FBI agent, including in conversations with his girlfriend, though the opinion does not report on

any evidence that the pretense was the but-for cause of anyone's giving defendant money or property. *United States* v. *Robbins*, 613 F.2d 688 (8th Cir. 1979). The Seventh Circuit upheld a § 912 conviction for defendant's pretending to his landlady to be an FBI agent, apparently with no attempt to use the pretense to get money or property. *United States* v. *Hamilton*, 276 F.2d 96 (7th Cir. 1960). Likewise, the Kansas Supreme Court upheld a conviction under a Kansas false impersonation statute for defendant's representing himself to a neighbor as an undercover state police officer, apparently with no attempt to use the pretense to get money or property. *State* v. *Messer*, 91 P.3d 1191 (Kan. 2004).

And courts have upheld similar statutes against a First Amendment challenge. *Chappell* v. *United States*, 2010 WL 2520627 (E.D. Va. June 21), for instance, upheld a state ban on impersonating a police officer. *United Seniors Ass'n, Inc.* v. *Social Sec. Admin.*, 423 F.3d 397, 404, 407 (4th Cir. 2005), upheld a federal ban on any use of the words "Social Security" to falsely represent the material as authorized by the Social Security Administration, though the ban covered not just solicitation of money but also, for instance, posters seeking viewers for a television broadcast. And *State* v. *Wickstrom*, 348 N.W.2d 183 (Wis. Ct. App. 1984), upheld a state ban on falsely acting as a public officer, in a case where the actions included making public statements, making private statements, and filing documents falsely indicating that the speaker was a municipal judge or town clerk.

These statutes are not limited to impersonation of government officials who have coercive power such

as that possessed by FBI agents or police officers. See, *e.g.*, 18 U.S.C. § 912 (covering impersonation of any federal government agent); *State* v. *Cantor*, 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987) (upholding conviction for defendant newspaper reporter's impersonating a county morgue employee in order to get information about a homicide victim from the victim's mother).

10. *Knowingly falsely representing oneself as having a particular university degree or professional license*, regardless of whether the false representation is intended to defraud a prospective employer or professional client. *Long* v. *State*, 622 So. 2d 536 (Fla. Ct. App. 1993) (upholding against First Amendment challenge a statute barring knowingly false claims of having a university degree); *People* v. *Kirk*, 310 N.Y.S.2d 155 (Cnty. Ct. 1969) (likewise, though reading the statute as limited to situations where there is an "intent to deceive"); *State* v. *Marino*, 929 P.2d 173 (Kan. Ct. App. 1996) (upholding against First Amendment challenge a statute barring knowingly false claims of having a professional license, as applied to a defendant who claimed to be a member of the Kansas bar when speaking on a television program to publicize a screenplay that he had written).

11. *Knowingly providing a false social security number*, even when there was no purpose to defraud anyone of anything of "pecuniary value," and the statement is not made to government agents. *E.g.*, *United States* v. *Silva-Chavez*, 888 F.2d 1481, 1483-84 (5th Cir. 1989); *United States* v. *Manning*, 955 F.2d 770 (1st Cir. 1992), *abrogated as to other parts of the decision, as recognized by United States* v. *Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006).

12. *Knowing falsehoods to voters about the authorship or endorsement of political campaign materials*, when the statements violate trademark law or other legal rules, even when no money is involved. *E.g.*, *United We Stand America, Inc.* v. *United We Stand, America New York, Inc.*, 128 F.3d 86 (2d Cir. 1997) (rejecting First Amendment arguments and upholding injunction against defendant's using the name "United We Stand, America"); *United We Stand America, Inc.* v. *United We Stand, America New York, Inc.*, 941 F. Supp. 39 (S.D.N.Y. 1996) (stating that the Lanham Act applies not just to deceptive uses of another organization's name with respect to fundraising, but also with respect to "holding public meetings and press conferences" and "propounding proposals") (quoting *Brach Van Houten Holding, Inc.* v. *Save Brach's Coalition for Chicago*, 856 F. Supp. 472, 475-76 (N.D. Ill. 1994)); *Tomei* v. *Finley*, 512 F. Supp. 695 (N.D. Ill. 1981) (rejecting First Amendment arguments and enjoining Democratic candidates from using the acronym "REP," as in "Vote REP April 7," as shorthand for the Representation for Every Person Party, a name seemingly chosen precisely to deceive voters into thinking that the candidates were Republicans); *Schmitt* v. *McLaughlin*, 275 N.W.2d 587, 590 (Minn. 1979) (rejecting First Amendment arguments in holding that the defendant's use of initials "DFL" in advertisements and lawn signs violated a state law barring false claims of support or endorsement by a political party, there the Democratic Farmer Labor party); *People* v. *Duryea*, 351 N.Y.S.2d 978, 988 (Sup. Ct. 1974) (dictum) (stating that a ban on false claims of endorsement by a political party would be constitutional), *aff'd*, 354 N.Y.S.2d 129 (App. Div. 1974).

13. *Making a knowingly false statement about which office one currently holds in an election campaign. Treasurer of the Comm. to Elect Gerald D. Lostracco* v. *Fox*, 389 N.W.2d 446 (Mich. Ct. App. 1986) (upholding against First Amendment challenge a statute banning false claims that one is the incumbent); *Ohio Democratic Party* v. *Ohio Elections Comm'n*, 2008 WL 3878364 (Ohio. Ct. App. Aug. 21) (upholding against First Amendment challenge a statute banning candidates from claiming to hold an office that they do not currently hold).

II. How First Amendment Doctrine Could Deal With Such Restrictions on Knowing Falsehoods

There are six general approaches that this Court might take to these sorts of restrictions.

(For purposes of our discussion, we will set aside the question whether, under *United States* v. *Stevens*, 130 S. Ct. 1577, 1584-86 (2010), the approach must be chosen based solely on which First Amendment exceptions have been historically long recognized. We will assume that statements in this Court's precedents that "there is no constitutional value in false statements of fact," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), and "[c]alculated falsehood falls into that class of utterances" which are categorically unprotected, *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964), leave this Court with flexibility in choosing how to define the constitutional protection offered to knowing falsehoods.

We anticipate that the parties and other *amici* will discuss the historical question, which is complicated by the fact that many restrictions that were ac-

cepted by the courts shortly after the Framing—including seditious libel law—have since been rightly rejected by this Court. But our tentative view is that there is some evidence, though not overwhelming evidence, that the freedoms of speech and of the press were seen in the early Republic as excluding falsehoods generally, and not just personal libels, financial fraud, or perjury. See, *e.g.*, *The Law Practice of Alexander Hamilton: Documents and Commentary* 811 (Julius Goebel ed. 1981) (reprinting Alexander Hamilton's defense argument in *People* v. *Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. 1804), that the freedom of the press extends to "the right of publishing the truth, from good motives and justifiable ends, though it reflect on government, on magistrates, or individuals," an argument that was not included in the *Johnson's Cases* report but that was printed elsewhere at the time); *Respublica* v. *Dennie*, 4 Yeates 267, 1805 WL 911, *4 (Pa. 1805) (expressly adopting Hamilton's view, in a case involving alleged libel against the government); *United States* v. *Sheldon*, 5 Blume Sup. Ct. Trans. 337, 1829 WL 3021, *11 (Mich. Terr. 1829) (expressly adopting Hamilton's view, apparently with reference to false statements that interfere with "the good of society" and not just with private rights); *Commonwealth* v. *Kneeland*, 20 Pick. 206, 219 (Mass. 1838) (taking the view that "falsehood against * * * institutions and governments" as well as against "individuals" was constitutionally unprotected).)

A. Holding that Most Restrictions on Knowing Falsehoods are Unconstitutional

This Court could broadly state that restrictions on knowingly false statements are generally not permitted under the First Amendment, with the exception, perhaps, of the most firmly entrenched restrictions, such as those on defamation, perjury, and fraud. This approach would not only invalidate the Stolen Valor Act, but would also effectively overrule *Time, Inc.* v. *Hill* and *Cantrell* v. *Forest City Publishing Co.* and thus reject the false light tort; would lead to the conclusion that knowing falsehoods cannot lead to liability under the emotional distress tort (at least unless they are also defamatory); would invalidate bans on the use of deceptive party and group names in election campaigns; and so on. We are skeptical that this is the right result, and we doubt that this Court is inclined to embark on such a path.

B. Recognizing Many First Amendment Exceptions for Various Kinds of Knowing Falsehoods

Another approach would be to hold that, though knowingly false statements of fact are generally constitutionally protected, there are many narrow exceptions to this rule: one for defamation, one for perjury, one for fraudulent solicitation of money, one for the false light tort, one for intentional infliction of emotional distress through knowing falsehoods, one for the knowing use of deceptive party names in campaigns, and so on.

This, though, would make it impossible for this Court to say, at it has before, that the exceptions to the general ban on content-based restrictions apply

only to "a few limited areas," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (indirectly quoting *R.A.V.*); *United States* v. *Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *R.A.V.*); *Virginia* v. *Black*, 538 U.S. 343, 358-59 (2003) (quoting *R.A.V.*); *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) (describing the exceptions as "a few legal categories"). The list of recognized First Amendment exceptions would grow from a handful—incitement, obscenity, threats, speech closely linked to conduct, fighting words, and false statements of fact—to more than fifteen (the first five of these, plus the dozen or so needed to accommodate the restrictions discussed above).

And this growth in the number of exceptions will likely stimulate calls for more exceptions, including ones not limited to false statements of fact. If more than fifteen categories of speech are excluded from First Amendment protection, why not more—perhaps "hate speech" or speech depicting violence or the like? Arguments such as this would gain more traction:

> [O]ver the past century the courts have carved out or tolerated dozens of "exceptions" to free speech. These exceptions include: speech used to form a criminal conspiracy or an ordinary contract; speech that disseminates an official secret; speech that defames or libels someone; speech that is obscene; speech that creates a hostile workplace; speech that violates a trademark or plagia-

> rizes another's words; speech that creates an immediately harmful impact or is tantamount to shouting fire in a crowded theatre; "patently offensive" speech directed at captive audiences or broadcast on the airwaves; speech that constitutes "fighting words"; speech that disrespects a judge, teacher, military officer, or other authority figure; speech used to defraud a consumer; words used to fix prices; words ("stick 'em up—hand over the money") used to communicate a criminal threat; and untruthful or irrelevant speech given under oath or during a trial.
>
> Much speech, then, is unprotected. The issues are whether the social interest in reining in racially offensive speech is as great as that which gives rise to these "exceptional" categories, and whether the use of racially offensive language has speech value.

Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343, 377 (1991); see also Kim Chandler Johnson & John Terrence Eck, *Eliminating Indian Stereotypes from American Society: Causes and Legal and Societal Solutions*, 20 Am. Ind. L. Rev. 65 (1995-96) (supporting a proposed exception for "racially offensive speech" by arguing that "there are dozens of 'exceptions' to free speech," and repeating largely the same list as that given in the Delgado article); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 Cal. L. Rev. 871, 892 (1994) ("Perhaps * * * in twenty or fifty years we will look upon hate speech rules with the

same equanimity with which we now view defamation, forgery, obscenity, copyright, and dozens of other exceptions to the free speech principle, and wonder why in the late twentieth century we resisted them so strongly.").

Today one could respond to such arguments by saying that permissible content-based speech restrictions actually fit within a few narrow categories—for instance, combining "speech that defames or libels someone," "speech that violates a trademark or plagiarizes another's words," "speech used to defraud a consumer," and "untruthful * * * speech given under oath or during a trial" in an exception for knowing falsehoods—or involve the government acting in a special capacity, such as employer or educator. But if the list of First Amendment exceptions grows longer, such arguments for new exceptions would become more appealing to many. Indeed, people who might today accept the protection of speech that they find offensive and harmful might be more inclined to call for new restrictions. "If proponents of all those many other exceptions got theirs," they might argue, "why can't I get mine?"

More broadly, this Court's decisions have powerful and long-term effects on the public's understanding of how our legal system should behave. Just as "[o]ur Government is the potent, the omnipresent teacher." *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), so in particular the Judicial Branch of the Government is a powerful teacher with regard to the Constitution. So long as the rule is "no content-based speech restrictions, subject to only a few exceptions," citizens are likely to

absorb the rule, even in cases where they do not like the result to which this rule leads.

But as the exceptions become more plentiful, they may begin to seem like they swallow the rule. As Justice Scalia noted in the Fourth Amendment context, once a rule (there, the warrant requirement) "become[s] so riddled with exceptions that it [is] basically unrecognizable," it is easy to see new exceptions not "as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years," and to conclude that the rule needs to be jettisoned altogether. *California* v. *Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in the judgment). We recognize that there is disagreement about whether indeed the warrant requirement should be retained, despite its exceptions; our point is simply that the multiplication of exceptions (from "only * * * a few specifically established and well-delineated exceptions," *Katz* v. *United States*, 389 U.S. 347, 357 (1967), to a vast array of such exceptions) undermines the normative force of the rule.

For this reason, the creation of a large array of free speech exceptions ought to be avoided. Having a dozen exceptions for subcategories of knowingly false statements may seem more speech-protective than having a general exception for all knowingly false statements. But such a proliferation of exceptions may ultimately prove to be less speech-protective, because it may open the door to more exceptions that will not be limited to knowing falsehoods.

C. Recognizing Several Broad Exceptions Covering Various Kinds of Knowing Falsehoods

The danger discussed in the previous subsection could be diminished if, instead of recognizing a dozen exceptions, this Court recognizes a few exceptions that are capacious enough to fit the examples given above. Thus, for instance, this Court might recognize a general exception for "false statements about other individuals, companies, or products," a category that includes defamation, false light, and trade libel. Likewise, this Court might recognize another exception for "deceitful statements that 'cause the deceived person to follow some course he would not have pursued but for the deceitful conduct'" (quoting *United States* v. *Lepowitch*, 318 U.S. 702, 704 (1943)), or that attempt to cause such a result. This category would cover fraud, attempted fraud, perjury, unsworn knowing falsehoods to government agents, impersonation (the field from which the *Lepowitch* quote is drawn), misuse of trademarks in an attempt to deceive voters, and so on.

But a definition broad enough to include the many kinds of fraud and attempted fraud, beyond just fraudulent attempts to get money, would likely cover nearly all knowing falsehoods—including knowing falsehoods about one's military medals. After all, the usual reason people lie is precisely to get something from listeners, and to deceive listeners in order to get them "to follow some course [they] would not have pursued but for the deceitful conduct." The

speakers might be seeking money,[2] a job,[3] a vote (which, when political candidates do it, is indeed an attempt to get a job), a good grade,[4] information,[5] business opportunities, romantic opportunities, or even just unearned respect. But all such attempts are a form of attempted fraud, once the requirement of trying to get money or property is relaxed.

And indeed it is not clear why, as a First Amendment matter, knowing falsehoods aimed at getting a $50 contribution should be constitutionally unprotected, but knowing falsehoods aimed at getting a vote, a high grade, a business opportunity, information, friendship, or sex should get First Amendment protection. Such line-drawing is doubtless often sensible as a matter of the substantive law of crimes or

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[2] *See Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600, 623-24 (2003) (holding that knowing falsehoods aimed at getting charitable contributions are constitutionally unprotected)

[3] *See Durgins* v. *City of East St. Louis*, 272 F.3d 841, 843 (7th Cir. 2001) (stating that "resumé fraud is not protected speech"); *Food Lion, Inc.* v. *Capital Cities/ABC, Inc.*, 194 F.3d 505, 512-14 (4th Cir. 1999) (treating resumé fraud as potentially tortious, though concluding that on the facts of the case plaintiff had not proved detrimental reliance on the false statements).

[4] *See Brown* v. *Li*, 308 F.3d 939, 956 (9th Cir. 2002) (dictum) (stating that plagiarism and cheating are not protected by the First Amendment).

[5] *See State* v. *Cantor*, 534 A.2d 83 (N.J. Super. Ct. App. Div. 1987) (upholding impersonation conviction for defendant newspaper reporter's impersonating a county morgue employee in order to get information about a homicide victim from the victim's mother).

torts. But we see no basis for viewing knowing falsehoods to get sex, friendship, votes, information, or even respect and attention as more protected *as a First Amendment matter* than knowing falsehoods to get modest amounts of money.

D. Upholding Various Restrictions on Knowing Falsehoods Under Strict Scrutiny

Another approach would be to conclude that much of the listed knowingly false speech falls outside any First Amendment exception, but that the restrictions discussed in Part I nonetheless pass strict scrutiny, just as some restrictions on true statements or on opinions could in principle pass strict scrutiny. But this would pose three difficulties.

First, it would lead to results that are inconsistent with this Court's precedents, precedents that treat false statements as less protected than true statements and opinions even when both kinds of statements implicate the same interest.

Consider, for example, statements about a person on a matter of public concern that are highly offensive to a reasonable person. If the statements are knowingly false, they are actionable under the "false light" tort, Restatement (Second) of Torts § 652E, and are not constitutionally protected, *Time* v. *Hill*. Yet if the statements are true or consist of opinion that does not imply false factual assertions, they are generally constitutionally protected even if they are not merely highly offensive but "outrageous" and cause "severe emotional distress." *Snyder* v. *Phelps*, 131 S. Ct. 1207 (2011). The existence of both *Time* v. *Hill* and *Snyder* v. *Phelps* as First Amendment precedents reflects the judgment that knowing false-

hoods do *not* have the same First Amendment value as other speech.

Second, upholding many restrictions on knowing falsehoods under strict scrutiny, coupled with insisting that the same strict scrutiny is applicable both to knowing falsehoods and to other speech, risks diluting the protection offered to that other speech. What this Court said in *Ohralik* v. *Ohio State Bar Ass'n.* 436 U.S. 447, 456 (1978), as to commercial speech is even more true as to knowingly false speech: "To require a parity of constitutional protection for [false] and [true] speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."

Third, today there is only one Supreme Court majority opinion that is still good law that upholds a content-based speech restriction under strict scrutiny: *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010), which involved national security and at the same time repeatedly stressed how narrow the burden of the speech restriction was. See, *e.g.*, *id.* at 2723, 2726, 2728 (stressing that the statute did not apply to independent advocacy defending or justifying the action of terrorist groups, and was limited to speech that is coordinated with those groups); *id.* at 2730 (stressing that "we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations" and that "[w]e also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organization"). The rarity of such decisions helps maintain a high level of speech protection. But if instead of one

such decision there end up being half a dozen or a dozen, those precedents will make other restrictions easier to uphold, much as recognizing many additional First Amendment exceptions will make it more likely that other exceptions will also be recognized, see *supra* Part II.B.

E. Recognizing a General First Amendment Exception for Knowing Falsehoods

The better solution, we believe, is to treat knowing falsehoods as categorically constituting a First Amendment exception, with some limitations we note below. Such a rule would reflect this Court's repeated judgment that "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003) (relying in part on *Gertz*'s holding that "the 'intentional lie' is 'no essential part of any exposition of ideas'" in concluding that fraud is constitutionally unprotected); see also, *e.g.*, *Herbert* v. *Lando*, 441 U.S. 153, 172 (1979) (quoting *Gertz*); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.") (citing *Gertz*); *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) ("Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *.'") (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)).

Such a rule would keep the list of exceptions manageably small, and thus less likely to grow. And by reserving strict scrutiny for content-based restrictions on true statements, statements of opinion, and other constitutionally valuable expression, such a rule would allow strict scrutiny in free speech cases to remain the very demanding, almost never satisfied test that it is today.

To be sure, as this Court's libel cases have recognized, some restrictions on falsehoods also tend to unduly deter true statements. "[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz*, 418 U.S. at 340. Because of this, reasonable mistakes and even negligent falsehoods should generally remain constitutionally protected, except in special cases, such as when compensatory damages for negligent errors are sought by private-figure libel plaintiffs, as in *Gertz*.

Furthermore, even some restrictions on knowing falsehoods involve an unusually high risk of factfinder error, factfinder bias, prosecutorial bias, legislator bias, or interference with scientific or historical investigation. For instance, *New York Times Co.* v. *Sullivan* held that false statements *about a government agency* (as opposed to a particular government official) may not be punished, period. "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.'" *New York Times Co.* v. *Sullivan*, 376 U.S. at 291 (quoting *City of Chicago* v. *Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)); see also *Rosenblatt* v.

Baer, 383 U.S. 75, 83 (1966) (following *New York Times Co.* v. *Sullivan* on this point).

Likewise, the First Amendment should limit prosecutions for alleged lies about history or science (at least outside commercial advertising, and absent defamation of a specific living person). The truth about such matters is especially likely to be uncertain, and outside the speaker's personal knowledge. Resolving what is true may be an especially politicized endeavor, with judges, prosecutors, and jurors of different ideological persuasions reaching different conclusions about science, history, or complex current events. The chilling effect of possible liability would thus be especially great in many such cases.

Moreover, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times Co.* v. *Sullivan*, 376 U.S. at 279 n.20 (quoting John Stuart Mill, *On Liberty* 15 (1947)). What is our main assurance that conventional wisdom among historians or scientists is likely to be correct, even when we ourselves lack the expertise to personally evaluate the question? Precisely the fact that scholars have reached and maintained a consensus on the conventional wisdom, in the face of others' unfettered freedom to challenge and try to rebut that consensus.

But say that factual criticism of a historical or scientific theory were banned, even using a ban limited only to criticism that a jury finds to be false and insincere. Confidence in the consensus view would then be less justified. First, we could not know

whether the continued consensus stems from scholars' not being exposed to outsider challenges, rather than from its continued scholarly acceptance despite the challenges. Second, we could not know whether the continued consensus is more apparent than real, because scholars who do find themselves having doubts are deterred from expressing them.

Thus, a case like *State* v. *Haffer*, 162 P. 45 (Wash. 1916), in which defendant was found guilty of libeling George Washington—Washington state law then allowed prosecutions for defaming the dead—would almost certainly come out differently today. To give another example, prosecutions for Holocaust denial should be similarly forbidden by the First Amendment, even if a factfinder could be persuaded that the deniers are knowing liars and not just reprehensible fools.[6] Likewise, *Schaefer* v. *United States*, 251 U.S. 466 (1920), in which speakers were convicted for "willfully * * * [publishing] false reports" during World War I, should also come out in favor of First Amendment protection today. See *id.* at 494 (Brandeis, J., dissenting) (concluding that allowing such prosecutions "subjects to new perils the consti-

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[6] See, *e.g.*, Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1 (2008) (so concluding); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. Rev. 1107, 1116-20 (2006) (likewise); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 Case W. Res. L. Rev. 1091, 1105 n.64 (2004) (saying that such statements "may well" be protected).

tutional liberty of the press," and "will doubtless discourage criticism of the policies of the government").

But while this means that the boundaries of the false statements of fact exception will be in some ways complex, such complexity cannot be avoided by choosing the many-exceptions or several-exceptions models described in Parts II.B and II.C. For instance, even a narrow exception for fraudulent attempts to get money could in principle end up being potentially applicable to statements about the government, science, or history: A candidate running for office could be prosecuted for making false claims about the government, on the theory that he was lying to his prospective employers (the people) in order to get money (the salary that he would get as an officeholder). The lower courts are currently split on whether general prohibitions on knowing falsehoods in election campaigns are constitutional.[7]

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[7] For cases stating that such prohibitions are constitutional, see *State* v. *Davis*, 499 N.E.2d 1255, 1259 (Ohio Ct. 1985); *Pestrak* v. *Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991); *Snortland* v. *Crawford*, 306 N.W.2d 614, 623 (N.D. 1981) (dictum); *Commonwealth* v. *Wadszinski*, 422 A.2d 124, 129-30 (Pa. 1980) (dictum); *Vanasco* v. *Schwartz*, 401 F. Supp. 87, 91-93 (S.D.N.Y. 1975) (3-judge court) (dictum). For cases so stating as to judicial elections, see *North Carolina State Bar* v. *Hunter*, 2010 WL 2163362, *10 (N.C. Ct. App. June 1); *In re Chmura*, 608 N.W.2d 31, 40 (Mich. 2000); *Mahan* v. *State of Nevada Judicial Ethics & Election Practices Comm'n*, 2000 WL 33937547, *4 (D. Nev. Mar. 23); *Weaver* v. *Bonner*, 309 F.2d 1312, 1319 (11th Cir. 2002) (dictum). Under *Republican Party* v. *White*, 536 U.S. 765 (2002), restrictions on the speech of candidates of judicial office are subject to the same First Amend-

Likewise, a book author might be sued or prosecuted for fraud on the theory that he was making money through knowingly false allegations about the government, or knowingly false claims about history. The majority in *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983 (3d Cir. 1985) (en banc), held that it was indeed constitutional to prosecute an author for allegedly defrauding a publisher and a movie producer based on the author's alleged misrepresentations about his contacts with Pope John Paul II, misrepresentations that appeared in the book itself. But three judges disagreed with the majority on this. See *id.* at 993 (Hunter, J., dissenting) (concluding that such fraud prosecutions were unconstitutional); *id.* at 1001 (Sloviter, J., dissenting) (concluding that such fraud prosecutions were unconstitutional, though civil liability would be constitutional); *and id.* at 997-98 (Leon Higginbotham, J., dissenting) (agreeing with Judges Hunter and Sloviter as a matter of First Amendment first principles, but concluding

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ment scrutiny as restrictions on the speech of candidates for other offices.

For cases holding that restrictions on knowing falsehoods in political campaigns are or might be generally unconstitutional, see *State ex rel. Public Disclosure Comm'n* v. *119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998) (striking down a law imposing civil liability for knowingly false statements in election campaigns); *281 Care Committee* v. *Arneson*, 638 F.3d 621 (8th Cir. 2011) (holding that a law criminalizing knowingly false statements in election campaigns had to be reviewed to determine whether it passes strict scrutiny, and remanding for such review). For a case in which the judges split 3-3 on the question, compare *In re Gableman*, 784 N.W.2d 605, 618, 624 (Wis. 2010) (Abrahamson, C.J.), with *In re Gableman*, 784 N.W.2d 631, 644-45 (Wis. 2010) (Prosser, J.).

that the then-existing First Amendment precedents did allow punishment of such fraud).

Presumably in such cases courts would have to be careful to prevent undue restrictions on First Amendment rights, whether the relevant exception is a general exception for knowing falsehoods or a specific exception for fraudulent attempts to get money. Whether courts conclude that an "actual malice" *mens rea* requirement suffices to avoid undue deterrence of speech in such cases (the view taken by the *Gronowicz* majority), or that there should be categorical protection even for some alleged knowing falsehoods (the view taken by the *Gronowicz* dissenters), that difficult inquiry would have to take place regardless of which broad approach this Court takes to crafting the First Amendment exceptions.

Finally, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), would provide some extra protection against improper speech restrictions even if a general exception for knowing falsehoods is recognized. "[C]ontent discrimination" even within a class of "proscribable speech" is presumptively unconstitutional, *id.* at 387, because it may "impose special prohibitions on those speakers who express views on disfavored subjects." *id.* at 391. Thus, for instance, a law specifically punishing knowingly false statements about the war in Afghanistan might well be unconstitutional, because it might be an attempt to specially burden one side of the debate, and make criticisms of the war more dangerous. Likewise, a law banning Holocaust denial would likely violate the *R.A.V.* principle.

We recognize that our proposed approach means that, in principle, the government could criminalize a

wide range of lies, including on comparatively minor matters, such as lying about one's age on a dating service or lying to a spouse about how much one lost at poker. See *United States* v. *Alvarez*, 638 F.3d 666, 673-75 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc). And we agree that many such lies should not be criminalized.

But the very fact that such lies are generally not illegal shows that the political process can generally be trusted to prevent the imposition of criminal liability for casual social lies. Indeed, the very fact that many such social lies are common, *id.* at 674-75, is a powerful political check on the growth of the criminal law in this area.

Yet when lawmakers think that a particular kind of lie is harmful enough, they should generally be free to prohibit it. Thus, for example, if legislators conclude that adults should not be allowed to falsely claim to be children in order to build an online relationship with a real child, the legislature would be free to criminalize such speech. See *United States* v. *Drew*, 259 F.R.D. 449 (C.D. Cal. 2009) (describing the Lori Drew/Megan Meier case, in which the 13-year-old Megan Meier committed suicide after having been psychologically manipulated by Lori Drew, an adult woman who won Meier's trust and affection by pretending to be a 16-year-old boy in her communication with Meier).

Under the approach we propose in this subsection, the Stolen Valor Act would be constitutional, precisely because it is highly unlikely to unduly chill true statements or statements of opinion. Whether we have received military decorations is easy for us

to be sure about, and generally much easier than it is for us to be sure about whether some other person has done something (the issue in most defamation cases). Cf. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.25 (1976) (concluding that false statements in commercial advertising should be more easily punishable than other false statements because "[t]he truth of commercial speech * * * may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else").

The truth of such claims is also unusually easy for the jury to determine with precision, so jurors' ideological sentiments are relatively unlikely to influence their factual judgment, compared even to jury decisions made when implementing permissible speech restrictions, such as libel law. Protecting false statements about such matters is not necessary for protecting the soundness of historical or scientific debate. And though the Stolen Valor Act does treat false statements about one's military decorations differently from other false statements, it appears to fit within one of the exceptions to the *R.A.V.* principle: "[T]he nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." 505 U.S. at 390. False claims of military honors are not limited to any particular viewpoints, or even particular topics of debate. They can equally be made by people who are anti-war, who are pro-war, or who are just trying to

stay in an office that is unrelated to the military or to have more influence in such an office.

F. Providing for Intermediate Scrutiny of Restrictions on Knowing Falsehoods

One other possible approach is to view knowing falsehoods as "low-value" speech, so that restrictions on the speech are judged under intermediate scrutiny rather than strict scrutiny. Commercial speech, for instance, is generally treated this way.

But such an approach is unlikely to yield results materially different from what the "no-value speech" approach described in Part II.E would yield, at least so long as restrictions such as those described in Part I remain generally upheld. Restrictions on fraudulent statements that seek to get money or votes would likely be justified on the theory that the restrictions are sufficiently "narrowly tailored" to the "substantial government interest" in protecting listeners against getting deceived. But the same interest would be applicable with regard to nearly all knowing falsehoods.

Consider the Stolen Valor Act itself. As we noted in Part II.C, people who lie about decorations generally do so for a reason: They may want to get elected to public office,[8] to get more credibility for their own statements in another's election campaign, to get

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[8] See, *e.g.*, Government's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss Indictment, *United States* v. *Alvarez*, No. 2:07-cr-01035-ER, at 5 n.1 (C.D. Cal. Jan. 14, 2008), http://volokh.com/files/alvarezresponse.pdf.

more credibility in some nonelectoral political debate, or even just to get more respect from neighbors, acquaintances, potential business associates, or potential romantic partners.

They are thus trying to manipulate listeners' behavior through falsehood, and their statements are quite likely to indeed affect listeners' behavior, particularly since having a military decoration is often seen as an especially important mark of merit. Just as trying to affect a federal employee's behavior through falsehoods creates a significant harm, see 18 U.S.C. § 1001, so trying to affect private citizens' behavior through falsehoods creates a significant harm—sometimes less significant, sometimes more significant, but significant nonetheless, because it involves manipulating people through deception. And if there is a substantial government interest in protecting people from being deceived into giving $50 to a charitable fundraiser, there is likewise a substantial government interest in protecting people from being deceived into giving others votes, respect, or attention.

We are not persuaded by the government's argument that the Stolen Valor Act can be justified by a compelling government interest in "conveying gratitude and recognition and fostering morale within the armed forces," Petitioner's Brief at 41. We share the Ninth Circuit's doubt that citizens lose respect for military decorations simply because some people falsely claim to have won such decorations. *United States* v. *Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010). If the Stolen Valor Act is struck down, military medals will still maintain their power to express

our nation's gratitude to true heroes, and to foster morale within the military.

Rather, a more certain and concrete harm of knowing falsehoods about military honors is the harm to listeners who are defrauded by such falsehoods—a harm that can often be greater than the harm from knowing falsehoods aimed at getting political contributions, and that is especially great precisely because military honors are so respected and valued. The interest in preventing this harm, like the interest in preventing harms stemming from other forms of fraud, would adequately justify the Stolen Valor Act even under intermediate scrutiny. And the interest would likewise justify nearly any restriction on knowing falsehoods.

At the same time, focusing chiefly on intermediate scrutiny might distract from the important task identified in Part II.E—identifying when certain restrictions on false statements are unconstitutional because they unduly chill true statements. Consider, for instance, this Court's conclusion that false statements often cannot be restricted unless they are made with "actual malice." Such a result could not have been reached under intermediate scrutiny: A strict liability regime in libel cases, for example, could easily be defended as "narrowly tailored" to a substantial government interest in protecting reputation, or to a substantial government interest in protecting listeners against being misled. After all, such a strict liability regime would advance those interests more than an "actual malice" requirement would, and would thus "promote[] a substantial government interest that would be achieved less effectively absent the [regime]." *Ward* v. *Rock Against*

Racism, 491 U.S. 781, 799 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985) (describing the requirements of narrow tailoring under intermediate scrutiny); *Board of Trustees of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 476-78 (1989) (adopting a similar standard under intermediate scrutiny for commercial speech). Likewise, even prohibitions on seditious libel, rejected by this Court in *New York Times Co.* v. *Sullivan*, might pass intermediate scrutiny, because they could well be seen as narrowly tailored to the substantial government interest in preventing citizens from being intentionally defrauded.

What is doing the work in this Court's decisions that impose *mens rea* requirements in false statement cases, and in this Court's rejection of seditious libel, is not any analysis of whether the restriction is necessary to serve a sufficiently important government interest under intermediate scrutiny or even strict scrutiny. Rather, it is a judgment about the degree to which the restrictions chill valuable speech—a judgment that is best exercised in defining the scope of the exception, rather than in applying intermediate or strict scrutiny.

CONCLUSION

For these reasons, the Stolen Valor Act, if read to apply only to knowingly false representations, should be seen as constitutional, on the grounds that the First Amendment generally does not protect knowingly false statements of fact.

Respectfully submitted.

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